

**BEFORE THE THREE MEMBER DUE PROCESS HEARING PANEL
EMPOWERED BY THE MISSOURI STATE BOARD OF EDUCATION
PURSUANT TO SECTION 162.961, RSMo.**

IN RE :

By his parents and

vs.

St. James R- VI School District

COVER SHEET

PETITIONER

Student's Name:

DOB:

Grade Level: Kindergarten

Parent's Name(s): and

Address:

Representative: Kenneth Chackes

Address: Chackes, Carlson & Spritzer
8390 Delmar Blvd., Suite 218
St. Louis, Missouri 63124

RESPONDENT

Local Education Agency: St. James R-VI School District (LEA)

Address: 101 East Scioto Street
St. James, Missouri 65559

Representative: Ms. Teri Goldman

Address: Goldman Law Firm
36 Four Seasons Center #337
St. Louis, Missouri 63017

Hearing Dates: May 19, 20, 21 and 22, 2003
July 8, 9, 10 and 15, 2003

Date for Mailing of Decision: September 3, 2003

Date of Decision: August 26, 2003

Panel Members: Dr. Gale Rice
Dr. Betty Chong
Ms. Margaret M. Mooney, Chairperson

ISSUES AND PURPOSE OF HEARING

In this hearing, the parents sought a declaration that the Respondent:

- a) Failed to provide Petitioner with a F.A.P.E. because the Respondent violated Student's and Parents' procedural and substantive rights in numerous ways including not allowing parents and professionals hired by them to have meaningful participation and input into development of Student's educational program;
- b) The placement of Student was not in the least restrictive environment to the maximum extent appropriate;
- c) School District changed placement for Student when he should have been in Stay Put in his previous placement based on the date his Parents filed for Due Process;
- d) School District's lack of appropriate educational services has resulted and will continue to result in Student regressing and being unable to transition to more mainstream school setting.

TIME LINE INFORMATION

Parents' request for due process was sent to the Department of Elementary and Secondary Education on December 16, 2002, but because of the timing of the office's hours it was recorded by DESE as being received on December 17, 2002 with a Decision initially due by January 31, 2003.

On or about January 14, 2003, Counsel for Parents requested a continuance of the Hearing until June 27, 2003. Counsel for the School District opposed the length of the extension. The Chair notified the parties on January 15, 2003 that the matter was set for Hearing on May 19-22, 2003 with the Decision to be rendered by June 27, 2003.

At the conclusion of testimony on May 22, 2003 the parties agreed on the record to four additional days for hearing on July 7-9 and 15, 2003 and they agreed that the time for mailing the Decision should be extended to August 15, 2003 so that post- Hearing Findings of Fact and Conclusions of Law could be filed by the parties. Ms. Teri Goldman, Counsel for District also made this request in writing on June 2, 2003. The Hearing Chairperson wrote all parties confirming the additional hearing dates and extending the time for Decision to August 15, 2003. Extensive post hearing legal memoranda and lengthy, detailed Findings of Fact and Conclusions of Law were filed by both parties on July 28, 2003.

On August 11, 2003 the Chair, after efforts to contact counsel for both parties, had a telephone conference with Counsel for Parents to discuss extending the time for mailing the Decision through and including September 3, 2003 because of the complex issues and lengthy post hearing pleadings filed by both parties and illness of one of the Hearing Panel members. Counsel for Parents sent an e-mail requesting an extension for mailing the Decision to September 3, 2003 on August 12, 2003. Counsel for the District did not oppose this request for continuance. On August 12, 2003, the Chair wrote all parties extending the time for mailing the Decision to September 3, 2003.

This hearing was held on May 19-22 and July 7-9 and 15, 2003 and

- (a) parents exercised their right to be accompanied and advised by counsel, Kenneth Chackes;
- (b) parents elected to open the Hearing to the public; and
- (c) parents elected to exclude witnesses prior to their testimony at Hearing

Extensive Findings of Fact and Conclusions of Law and post hearing Legal Memos were filed by counsel for both parties on July 28, 2003.

The Decision, which included a majority decision and dissenting decision was mailed to counsel for both parties by certified mail on August 26, 2003

**BEFORE THE THREE-PERSON DUE PROCESS HEARING PANEL
EMPOWERED BY THE MISSOURI STATE BOARD OF EDUCATION
PURSUANT TO SECTION 162.961, RSMo.**

)
)
Complainant,)
)
vs.)
)
ST. JAMES R-1 SCHOOL DISTRICT,)
)
Respondent.)

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

This is the final decision of the three person hearing panel in a due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415(f) (1997), and Missouri law. §162.961.3 RSMo.

BACKGROUND AND TIMELINE

1. ('Student') is years old. [DOB]. He resides with his parents, and (Parents, Father, Mother, respectively) within the area served by the St. James R-I School District (District). Tr. 5/20 560.¹ Parents are literate and their primary language is English. Student's current educational diagnosis is Autism. Ex. P-60.²

2. The St. James R-1 School District is a school district organized pursuant to Missouri Statutes.

3. Student and Parents were represented by legal counsel, Kenneth M. Chackes, Chackes, Carlson & Spritzer, 8390 Delmar Boulevard, Suite 218, St. Louis, Missouri 63124.

¹ References to the transcript are noted as Tr. followed by the date and page number.

² Complainant's exhibits are identified as P-1 etc. Respondent's exhibits as R-1 etc.

District was represented by Teri B. Goldman, Goldman Law Firm, 36 Four Seasons Center, #337, St. Louis, Missouri 63017.

4. The Hearing Panel for the due process proceeding was:

Margaret M. Mooney, Hearing Chairperson
Dr. Gale Rice, Panel Member
Dr. Betty Chong, Panel Member

5. On or about December 16, 2002, Parents faxed a request to DESE requesting a due process hearing. (HP Ex. 1). The request for the due process hearing was received by DESE on December 17, 2002. On or about December 17, 2002 Ms. Pam Williams, Director for Special Education Compliance at DESE, notified the Parents (HP Ex. 2) and District (HP Ex. 4) that Parents' due process request had been received and that they need to select a hearing panel member for the requested due process hearing. On or about January 2, 2003 Ms. Williams notified the Hearing Chairperson (HP Ex. 3) and the Hearing Panel Members (HP Ex. 4) that they had been selected to serve on the Hearing Panel for the Parent's Request for Due Process and that a Hearing must be held and decision rendered by January 31, 2003. On or about December 17, 2002 Ms. Williams provided the Parents with a copy of the Procedural Safeguards for Parents and Children (HP Ex. 3). On or about January 14, 2003 Counsel for the Parents requested that the time lines for the decision be extended through June 27, 2003 by e-mail. On January 15, 2003, the Hearing Chairperson notified the parties that time for the due process hearing to be held and a written decision rendered was extended to June 27, 2003 at the request of Parents, who sought an independent education evaluation prior to hearing. On January 15, 2003, the Hearing Chairperson wrote to all parties setting this matter for hearing on May 19- 22, 2003 at 9:00 o'clock a.m. at St. James School District Office, 101 East Scioto Street, St. James,

Missouri 65559. (HP Ex. 10). Hearing was held for four days on May 19-22, 2003 and was not completed. On June 2, 2003, Ms. Goldman requested extension of the time line for decision to August 15, 2003. On June 2, 2003, the Hearing Chairperson sent a letter to all parties extending the time for rendering the decision to and including August 15, 2003. (HP Ex. 14). Thereafter on August 12, 2003 Counsel for Parents by e-mail requested an extension of the time for mailing the Decision to the Hearing Chairperson until September 3, 2003. On August 12, 2003 the Chairperson wrote to all parties extending the time for mailing the Decision to and including September 3, 2003.

6. District filed a Motion for More Definite Statement and to Dismiss. Parents responded with a Legal Memorandum and Statement of Issues (HP Ex. 13) identifying six grounds they contended amount to denial of a Free Appropriate Education for Student. On May 8, 2003, the Hearing Chairperson filed a Decision permitting the due process to go forward and stating that the issues to be raised at Hearing would be determined by the full Hearing Panel. (HP Ex. 8)

7. At the opening of the Hearing on May 19, 2003, Parents and District presented argument regarding the justiciability of each of the issues raised by parents. The full Hearing Panel determined:

MS. MOONEY: Regarding the School District's Motion to Dismiss issues as non-justiciable, we have ---the Hearing Panel has considered the arguments made by counsel for both the parents and the school district. And with respect to the parents' issues under A-1, the subquestions or subissues that they raise, the Panel will hear testimony concerning denial of request for behavior analyst to observe. We will hear the testimony regarding denied request for behavioral analyst to be part of the IEP team, which the District acknowledged was a reasonable issue. We will not hear evidence on the denied request for behavioral analyst to talk to the team. We will not hear evidence regarding denied request for a speech therapist

to observe. We will not hear evidence on the refusal to allow the parents to participate in training of an aid.

With respect to the question of refusal to allow an independent Evaluator to observe, that was previously decided by the Panel, and that is moot. We do not need to hear more testimony on that topic. We will hear testimony regarding refusal to communicate regularly with parents, including regarding disciplinary actions and behavioral issues that result in removal from classroom and new intervention strategies.

We will hearing at least limited testimony on the refusal to allow parents to tape record IEP meetings. And with respect to Item A-4, we will hear testimony on the collecting and reporting of data. Ex. P-27, Tr. 5/19 lines 5 to 13.

It's the decision of the Hearing Panel that we will not hear additional information on an independent evaluator to observe dating back to 2001. Ex. P-30-31, Tr. 5/19 lines 23-25; 1-2.

8. Parents in their post hearing Proposed Findings of Fact and in their Statement of Issues complain that District refused to allow Parents and professionals hired by them to have meaningful participation and input into the development of Student's educational program. Parents have supplemented District's educational program with private services, including behavior therapy, language therapy and occupational therapy. District provides services to Student in each of those areas. Parents have communicated and attempted to work cooperatively with District and Student's private service providers to develop and implement a coordinated educational program. By refusing Parents' requests for observations and regular communications Parents contend District violated the core procedural requirements of the law pertaining to parent participation by refusing the Parent's requests for observations and regular communications. Parents' Statement of Issues, HP Ex. 13.

9. Parents complain that District violated the least restrictive environment mandate of the law based on District's failure to educate Student to the maximum extent

appropriate in the regular educational environment, and District's "removal of [Student] from the regular educational environment" even though the "nature or severity of the disability" does not prevent his receiving a satisfactory "education in regular classes with the use of supplementary aids and services."³ Parents and their experts contend that by using an effective behavior intervention plan District could significantly reduce the behaviors that interfere with Student's education in the regular education environment. Parents' Statement of Issues, HP Ex. 13.

10. Parents do not contest District's repeated assertion that Student made progress in academics and language during his three years in its schools. Parents do not concede that District's educational programs have been reasonably calculated to provide Student educational benefit or to maximize his capabilities.

FINDINGS OF FACT

1. Mother is a psychologist, licensed in Missouri, she has a Master's degree in child clinical psychology and approximately 77 credit hours beyond her Master's and considerable training and experience working with children with developmental disabilities and, in particular, autism. Ex. P-86; Tr. 5/20 561-566, 572-573. Mother has attended workshops and other training programs regarding education and behavioral interventions for children with Autism, she completed several training programs provided by Project ACCESS, a training center funded by the Missouri Department of Elementary and Secondary Education (DESE) for the education of children with Autism, including training for In-District Autism Consultant (IDAC). She has a contract with the Center for Innovations in Education (CISE) to be a trainer of school district

³ 34 C.F.R. § 300.550(b); 20 U.S.C. § 1412(a)(5)(A).

staff to become In-District Autism Consultants.⁴ Tr. 5/20 577-584. Mother has Crohn's disease, fibromyalgia and a back defect that causes pain and hypothyroidism that causes low energy and fatigue. Tr. 5/22 870-71. Tr. 5/20 564-66. Mother testified in person and attended and participated in all sessions of the Hearing.

2. Father has undergraduate education in the fields of psychology and engineering. He has Attention Deficit Hyperactivity Disorder (ADHD), and allegedly had difficulty participating in Student's IEP meetings. Father's ADHD was reported to District on Student's initial case history form, before his participation in IEP meetings became an issue. Tr. 5/20 433, 437-40; Ex. R-3, at 34. Father testified in person and attended and participated in the Hearing.

3. When Student moved to Missouri at age 2; he was assessed and provided developmental and speech-language therapy through First Steps from Fall 1999 to Spring 2000. Tr. 5/20 592-94; Exs. P-6, 7, 9-12, 15-18. In December 1999 Student was evaluated by Ching Wang, M.D., Assistant Professor of Pediatric Neurology at the Missouri University Hospital and Clinics in Columbia, who concluded that Student's symptoms, were "consistent with a diagnosis of autistic disorder." Tr. 5/20 597-600; Ex. P-13.

4. James Partington, Ph.D., BCBA is a psychologist and board certified behavior analyst specializing in children with autism and other pervasive developmental disorders. He has worked with children with disabilities, including autism for over 30 years, as a classroom teacher, in his own school and clinic, and in other settings using behavior analysis programs. Tr. 5/19 45-46, 53-56. Dr. Partington is co-founder and director of the STARS School and director of the Integrated Sites Program, divisions of Behavior Analysts, Inc., in California. He has

⁴ CISE is a collaboration between DESE and the University of Missouri-Columbia College of Education.

taught college level courses on autism, behavior modification, and language development; authored publications in his field, including the Assessment of Basic Language and Learning Skills (ABLLS); and received several awards. Ex. P-87, at 2-4; Tr. 5/19 63-67. Dr. Partington testified in person at the Hearing on behalf of Parents. He said that research strongly supports the use of intensive behavioral intervention strategies as the most effective type of programming available for children with autism and that the particular form of the behavioral intervention should be individualized based on an analysis of each child. Tr. 5/19 47-50; 61-62, 181-83, 241-44. He testified that behavior analysis involves study of behavior in conjunction with the antecedent or setting event; the behavior itself, including intensity and latency since the stimulus; and the consequence. A behavior analyst looks at the motivation for the behavior and determines how to reinforce appropriate behaviors so they recur. Tr. 5/19 59-60.

5. Dr. Partington is familiar with Student from his experience at the Summer 2002 clinic program in California and an evaluation he conducted April 14-15, 2003 at District pursuant to the Panel Chair's prior order. He did not administer any tests to Student, but observed him for approximately six hours over two days in a variety of educational settings and was able to speak to school staff. Tr. 5/19 95. Dr. Partington testified that he believed several changes should be made in District's program for Student to help improve his behavior and increase the skills he needs to be successfully integrated into a regular classroom. Ex. P-88, ¶¶ 66, 89, 91, Tr. 5/19. Based on his observations and evaluation of Student and Student's programming received from the School District, Dr. Partington did not recommend a change in

the methodology District is attempting to use. Tr. 5/19 237-38.⁵ Dr. Partington stated the District staff that he observed working with Student, were well intentioned, but needed more training. Tr. 5/19 238-40. Dr. Partington testified that some time in special education is appropriate for Student, but based on the progress made by Student in the 2002 Summer clinic program; he expected more progress during kindergarten in areas needed for integration. Tr. 5/19 150-57, 234-36. Dr. Partington expressed concern about Student's ability to progress to first grade due to current weaknesses including disruptive and inappropriate behaviors. Tr. 5/19 257-58.

6. Dr. Partington testified that his approach to Student's behaviors is a methodology and that other methodologies exist that could be used to address Student's behaviors. Tr. 5/19 179-181. Dr. Partington testified that Student requires time in special education so that his problematic behaviors can be intentionally triggered and that such behaviors would be disruptive in regular education; however, he refused to give an opinion as to how much time in special education he would recommend. Tr. 5/19 151-52. He testified that, in his opinion, Student's current placement is appropriate and includes a proper balance of regular education and special education. Tr. 5/19 269. He also testified that the manner in which the District is using the ABLLS is an appropriate use of that instrument, and that, if additional squares are blackened on the ABLLS over time, the ABLLS shows that the student is making progress. Tr. 5/19 171-73.

⁵ Ms. Hall testified she used "errorless training" or "errorless teaching", a form of applied behavior analysis. Tr. 7/8 179, 296. Ms. Goldman stated that District used ABA as one of the instructional methodologies for Student. Ex. P-57.

7. Dr. Partington testified that District's behavior intervention plans in Student's November 2002 IEP were not sufficient for reducing his inappropriate behaviors. Tr. 5/19, 100-16; Ex. P-75, at P1125, 15, P1124, 17, Ex. R-74, 806-09. In his opinion, the deficiencies in the behavior intervention plans included the failure to differentiate between aggressive behaviors and disruptive, yelling out, behaviors; drawing attention to or reinforcing negative behaviors; and the methods of taking data to measure the reduction of behaviors (Tr. 5/19 103-04, 107-09, 111-16, 118-123, 111-16, 119-23). In his opinion, District's IEP and behavior plans for Student are missing a critical component: behavior strategies to teach him to follow adult controlled directions, and respond calmly to changes in adult controlled activities. Tr. 5/19 98-100, 104-07, 115-16. District's data made it difficult to determine if Student's behavior improved during Kindergarten, but plainly some of the disruptive behaviors that were identified in the Fall were still being seen in April 2003. Tr. 5/19 136.

8. Dr. Partington testified that more expertise is needed in District to develop and implement an effective behavior plan for Student. District should have someone with extensive training in behavior analysis, with a Master's or its equivalent in the field, and with experience in implementing behavior change programs and for teaching the kinds of skills Student needs to cooperate and remain calm in difficult situations to design, implement and monitor the program. Tr. 5/19 116-18, 123-24. He said there are people in Missouri, including 16 board certified behavior analysts or associate behavior analysts, who could develop and implement an effective program for Student and that a consultant, who would develop and help implement a program, would not need to be in District full time. Tr. 5/19 117-18, 124, 231-32.

9. Dr. Partington testified that an essential component of an effective behavior intervention program for Student is consistency and coordination with Parents, including daily communication and occasional observations at school because Student has an extreme need for consistency with regard to his behavior. Tr. 5/19 125-30, 244-46; Ex. P-88 at 4-5. He stated that current data needed to be readily available to Parents. Ex. P-88, at 4-5. He testified that because of Student's need for consistency and skill deficits, he needs an extended school year program.

10. An Occupational Therapy evaluation was performed on Student in April 2000 by the Judevine Center in Columbia, Missouri and Student was evaluated, by the Autism Clinic of the University of Missouri. Ex. R-6, at 66-72; Ex. P-25, 26, 27.

11. Janet Reed, Ph.D, performed a neuropsychological evaluation of Student for the Autism Clinic on May 9, 2000, and a follow up evaluation on May 13, 2003. Ex. P-25; Tr. 5/20, 293-94. She testified at the Hearing by telephone on behalf of Parents. Dr. Reed is a clinical pediatric psychologist, with a specialty in neuropsychology, who has worked with children with autism, performing assessments and some coordination of treatment, including children ages three to five, in elementary schools in Missouri. Tr. 5/20 282-85, 344; Ex. P-100. Dr. Reed agreed with Student's diagnosis of autism, noting as strengths superior nonverbal intellectual functioning and sufficient receptive language skills to support many teaching activities. Ex. P-25, at P0162-P0163. Dr. Reed testified that with any behavioral intervention, for children as young as Student, it is important to have consistency between home and school, which can be accomplished through regular daily communication and charting and tracking of behavior. Tr. 5/20 290-92. Dr. Reed expressed the opinion that Student could succeed in a regular classroom with supports, including an effective behavioral intervention plan. Tr. 5/20 300-01. For a

behavior intervention program to be effective for Student, Dr. Reed testified that a District would need a person with at least a year's training in behavioral intervention, including direct observation and supervision by someone with experience in that area. Tr. 5/20 298-300, 308-09. She stated that Student's disruptive behaviors could be reduced with an effective behavior plan, and without such a plan, it would be very difficult to do. Tr. 3/20, 369, 381. Dr. Reed testified that the behavior intervention plans in Student's November 2002 IEP, were deficient. Tr. 5/20, 363-64. She has not attended any IEPs for Student.

12. Judith Miles, M.D., Ph.D., a pediatric physician and a medical geneticist, participated in Student's evaluation at the University of Missouri in the Spring of 2000. Ex. P-99, P-26, P-27. She testified at the Hearing by telephone on behalf of Parents. She is a professor at the medical school, and Director of the Autism Center at the University of Missouri since 1995. Tr. 5/20, 386-87. Dr. Miles has published articles and chapters on the treatment of children with autism and she spends about 30% of her time working with children with autism. Ex. P-99, at 11-13; Tr. 5/20 387. Dr. Miles recommended that Student continue to receive ABA, or early intensive intervention, therapy. Ex. P-27; Tr. 5/20 390-91. She testified that a University study showed children did better when Parents participated in the programs and in her experience coordination of programs leads to success. Tr. 5/20, 405-06, 417. She never observed Student in school or at home. She wrote to Ms. Myra Soete with recommendations for Student's educational program, but said that she did not expect a reply. Tr. 5/20, 399, 402.

13. District's multi-disciplinary team evaluated Student in March 2000 and determined that Student was eligible for early childhood special education, but rather than begin

a program when he turned three in April 2000, waited, with the agreement of Parents, until the Fall of 2000. Ex. R-5.

14. District conducted its first Individualized Education Program (IEP) meeting for Student in August 2000. Ex. R-7. Parents gave District copies of the reports from Dr. Wang and Dr. Miles and an outline of requested goals and objectives, and a list of interventions sought or that they would provide for Student. Tr. 5/21 816; Ex. R-4, at 45-47. District's initial IEP provided Student with 660 minutes (11 hours) per week of self contained special education instruction, 360 minutes (6 hours) of itinerant instruction, two hours of speech therapy, and one hour of occupational therapy. Ex. R-7, at 94.

15. Ms. Nancy Hall was Student's early childhood special education teacher for two years. After teaching Student for the two years, prior to his Kindergarten year, Ms. Hall received training to become an In-District Autism Consultant ("IDAC"). Tr. 7/8 82. Ms. Hall testified at the Hearing in person for the District. Ms. Hall had 10 years of teaching experience at the time of the Hearing. Tr. 7/8 10. Working with Student was her first experience in early childhood special education and her first experience with a high functioning child with autism of any age. Tr. 7/8 10-12, 264-65. She had no training specific to autism before being assigned to work with Student and she never had any training in teaching children with autism with on-site supervision. However, she has since attended several seminars or workshops addressing needs of children with Autism, behavior analysis and behavior management. Tr. 7/8 13-14, 18-49-, 22, 269. She introduced and used the concept of pairing with Student. Tr. 7/8 19-21. In early October 2000, Parents and Ms. Hall attended a training program in St. Louis conducted by Dr. Vince Carbone. Tr. 5/21 818.

16. During the 2000-01 and 2001-02 school years, the District's early childhood special education program consisted of two components. During the morning hours, Ms. Hall provided 1:1 itinerant services in their homes or daycare settings. In the afternoon, Ms. Hall taught as many as 10 children in a school center-based program. Tr. 7/8 27. She testified that during the 2001-02 school year, Student made "lots of progress." He began speaking in two-three word sentences that were not echolalic and began engaging in pretend play, an important developmental step. Tr. 7/8 46-49. Student progressed to where he could attend during circle time, improved in his ability to play with the other children and learned to predict and follow the classroom routine. Tr. 7/8 49-51; *see also* Ex. R-25 at 202. During the 2000-01 school year, Ms. Hall took data to measure Student's progress and reported that progress quarterly on the IEP. Tr. 7/8 163. In addition, the occupational and speech therapists kept data with respect to their areas of responsibility and each did so in a way suited to their needs. Tr. 7/8 168-6. The raw data maintained by these individuals was not intended to be provided to the Parents. At the beginning of his first year of school (2000-01) Mother was concerned about how Student was doing, what teachers were doing with him at school, his behaviors and what plan District was following for dealing with those behaviors. On October 15, 2000, after Student had been in school for two months, Parents wrote District, addressed to Myra Soete, District Special Education Director, and Nancy Hall, Student's teacher. Ex. P-30. Parents testified at Hearing they were not intending to complain, but to express their concerns and to try to work together with District to develop a plan for working with Student. Tr. 5/21 822-27. Thereafter, Mother met with Ms. Hall and Ms. Soete, who said they considered Parents' letter a complaint. Mother expressed her concerns about the lack of a plan, or her lack of knowledge of the plan, and her desire to work

together with District. Ms. Hall allegedly became upset and defensive, and left the meeting. Tr. 5/21 828-29. Neither Ms. Soete nor Ms. Hall disputed Mother's testimony on this point.

17. In notices dated October 31, 2000, District agreed to send the Ms. Kim Stokes, a paraprofessional assigned to Student from the beginning of his early childhood program, to one ACCESS training. District refused to agree to utilize primarily the techniques of errorless learning and applied behavior analysis with a specific plan. Ex. P-30, M524a-d.

18. During Student's first year at District (2000-01) Mother asked Ms. Hall for a log to be sent back and forth regarding his behaviors and the basic concepts covered at school, so Parents could work on the same issues at home. Tr. 5/21 833-34. Ms. Hall disagreed with the level of communication Parents sought. Most communication about his behavior was oral, when Mother dropped Student off and picked him up, and was limited to whether he had an "okay day or not." Tr. 5/21 834-35. On or about October 30, 2000, Student's IEP team reconvened to consider the Parent's request for certain training and methodologies. Ex. R-7 at 94; Ex. R-9 at 100; Tr. 5/21 831-33; Tr. 7/8 154. On or about November 10, 2000, Student's IEP team again reconvened to review and revise his IEP and to consider his need for extended school year ("ESY") services. Ex. R-10 at 103-04; Tr. 7/8 155. At that meeting, a new IEP was prepared. Parents wished to be informed of new skills introduced at school so that they could provide follow-through at home and Ms. Hall verbally provided that information on a daily basis. The IEP contains appropriate goals and objectives on a quarterly basis. Ex. R-10 at 104. The IEP contains appropriate goals and objectives in the following areas: communication, daily living skills, socialization, receptive, expressive and pragmatic language and academics. Ex. R-10 at 104-111; Tr. 7/8 156. Student's placement remained the same as in his previous IEP. Ex. R-10

at 112. At the conclusion of the meeting, Student's team agreed to reconvene in May 2001 to determine whether he required ESY services.

19. Mother testified that at nearly every IEP meeting Parents expressed concerns about collaboration between the services Parents were providing and the District's program. District's general response was that the home and school programs were separate and District only needed to work on Student's behaviors at school. Tr. 5/21 842-43.

20. Joanne Atkinson (now Rhodus) worked with Student as a private speech/language pathologist during his time in District's early childhood special education program, 2000-01 and 2001-02. She testified in person at Hearing for Parents. Ms. Atkinson has Bachelor's and Master's degrees in speech/language pathology and is a certified speech/language pathologist. She has centered her work on children with autism and has additional training in Applied Behavior Analysis and sensory integration. Tr. 5/20 478-88.

21. Ms. Atkinson attended the May 2001 IEP meeting to discuss Student's progress and goals she was working on in private language therapy. She also worked with Student and Mother on modifying his behaviors in addition to language skills. Tr. 5/20 489-93. She gave a written progress report to Ms. Hall that was not discussed at the IEP meeting. Tr. 5/20 494 - 95, 498; Ex. P-38. Ms. Hall testified that the IEP team did not discuss reports from outside experts at IEP meetings. Tr. 7/8 324. At that IEP meeting, and others attended by Ms. Atkinson, District indicated that no collaboration would be taking place because it was not necessary. Tr. 5/20 501, 545-46, 550-52.

22. Ms. Atkinson attended IEP meetings in which Parents requested that she have the opportunity to observe Student at school, which District refused stating this was not necessary.

Tr. 5/20 503-04, 507. In her opinion collaboration between the school and outside service providers was important for Student to make progress with his behaviors. Tr. 5/20 501-02.

23. At the May 2001 IEP meeting District considered an extended school year program for Student for the Summer 2001 with a structured program to prevent significant regression, three hours a day with assistance at Student's daycare, in addition to two hours per week of speech and language therapy that District was offering. P-37; Tr. 5/21 835-36. At the meeting, the IEP team reviewed Student's then-current IEP goals and objectives. District personnel distributed the District's policy regarding ESY. Ex. R-12 at 121; Tr. 5/22 1014. Based on data collected, Ms. Hall recommended that Student required ESY only with respect to certain language goals and stated that there had been no documented or anticipated regression problems in other areas. Ex. R-12 at 122; *see also* Tr. 5/21 830, 839. At the meeting, the District proposed that Student receive two hours per week of ESY in the language area for the entire summer. Ex. R-10 at 112; Tr. 5/21:836; 7/8:157. Mother disagreed and requested the District provide Student with a 1:1 aide in the day care setting for three hours per day and additionally provide two hours of speech therapy. Ex. R-10 at 112; R-12 at 122; Tr. 5/21:836; 7/8 157. Although Ms. Atkinson attended the meeting, she did not give the team any data regarding possible regression. Tr. 5/20 532. On or about May 9, 2001, the District provided the Parents with a notice of action refusing their ESY request for three hours per day at the day care setting with a 1:1 Ex. R-12 at 125A. The written notice states that the services proposed by the District were adequate to avoid any anticipated regression. Ex. R-12 at 125-A-B.

24. Parents and Ms. Atkinson did not feel that Parents' request for extended school year services or Ms. Atkinson's input was considered by District. Tr. 5/20 495-96; Tr. 5/21 837.

When Ms. Atkinson tried to point out that children with autism do not learn by observation but must be taught every skill, Ms. Hall responded that Ms. Atkinson was not part of the IEP team. Tr. 5/20 496, 499. Ms. Hall admitted making that remark. Tr. 7/8 325. Ms. Atkinson testified that District IEP team members appeared to have come to a decision before the IEP meeting with Parents. Tr. 5/20 497-98. Father testified that IEP meetings with District did not appear to be a partnership in which District was working together with Parents. He felt that Parents' requests were not discussed in a meaningful way, but that District staff seemed to have pre-rehearsed their positions. Tr. 5/20 467-69.

25. Deanna Jones, Student's special education teacher and IEP case manager during Kindergarten (2002-2003), his most recent year in District, testified in person at the Hearing. Parents interpret her testimony to be that the decision not to offer extended school year services for 2003 was made by District at a staff meeting prior to the IEP meeting, which Parents did not attend. Tr. 5/21 710, 712-13. District Staff is entitled to have a consensus prior to meeting with Parents.

26. Before the May 2001 IEP meeting Parents asked to tape record so they would have a permanent record of the meeting. Parents stated two reasons: to help them remember what happened at meetings and to allow them to participate fully in the IEP process. They allegedly sought tape recording as an accommodation to ensure Father's rights as a parent were protected under the IDEA. Ex. P-34; Tr. 5/20 441-43. District, in a letter from Ms. Soete, denied Parents' request to tape record the IEP meeting stating that the denial was based on the grounds that Parents had both exhibited the ability to participate in previous meetings and that IDEA does not require the full participation of both parents. Ex. P-36. District provided a

person to take notes at IEP meetings that were made available to parents instead. Father confirmed that, when he attended IEP meetings for Student, he and Mother had the opportunity to express their opinions and ask questions, and to invite others, who were allowed to participate. Tr. 5/20, 461-62.

27. Following the May 2001 IEP meeting, Parents wrote several letters to District requesting information regarding its policies and procedures in connection with educational records, extended school year, positive behavior interventions, and other matters concerning compliance with the IDEA. Ex. R-13, 126-32. Parents filed several child complaints with the Department of Elementary and Secondary Education. Their first was after the May 2001 IEP meeting. Ex. R-15, 136. District Superintendent responded by referring Parents' correspondence to District's attorney. Ex. R-16, 139. Parents submitted several more child complaints to DESE, and additional requests for information to District. Ex. R-17, R-18, R-19, R-20, R-23. On or about June 20, 2001, DESE issued its decision regarding the Parents' first child complaint. Ex. R-24 at 198. In that decision, DESE concluded that the District was not out of compliance and stated that the notice of action provided to the Parents contained all necessary components required by IDEA. Ex. R-24 at 200.

28. During the Summer 2001 Student's disruptive behaviors escalated per testimony of Ms. Atkinson that he started banging his head at daycare in July and August, and his screaming and self-stimulating behaviors increased. Tr. 5/20 505, 510. Mother told Dr. Miles in September 2001 that Student's rigidity with routine got worse; he had difficulty tolerating touch, tantrums and screaming that sometimes escalated to head banging. Tr. 5/21 839-40; Ex. P-49.

29. On August 13, 2001, District held an IEP meeting to develop a new IEP for Student's second year in early childhood special education. Ex. P-42. Ex. R-29, R-32; Tr. 7/8: 175-76. At the meeting, Parents were given copies of additional education records relating to Student and they had an opportunity to review those records prior to the meeting. Tr. 5/21 841-842. Parents and Ms. Atkinson provided input regarding the content of the IEP. Ex. R-32. Because the team was unable to complete its review of the IEP, the team agreed to reconvene on August 29, 2001. Ex. R-32, R-34, R-38; Tr. 5/21 843; 7/8 177. In the interim, Parents again gave District a list items for consideration. Parents sought "[r]egular communication" with Parents about Student's progress, skills, and inappropriate behaviors; "collaboration and agreement about . . . strategies" for addressing inappropriate behaviors; training for staff in Applied Behavior Analysis; "[r]egular communication and collaboration between a behavioral consultant and District staff," and "[r]egular data collection." Ex. P-43; Tr. 5/21 844-45.

30. At the August 29, 2001 IEP Parents requested daily oral and weekly written reports. Ex. P-45, at P0726. Ms. Hall testified she agreed to bi-weekly reports at the IEP meeting, although the IEP minutes inaccurately indicate she agreed to "weekly reports." Tr. 7/8 180-181; Ex. P-45, at P0726. There is no written notice of action refused for Parents' request for daily and weekly communication. Ms. Hall said she would not include daily communication in the IEP because she might not have time to do it, and she would not talk to Mother because she had filed a complaint quoting Ms. Hall, which Ms. Hall described as "disrespectful." Tr. 5/21 845. Ms. Hall said she would not meet with Mother because she was afraid of being quoted and that Mother would file a child complaint. Tr. 5/22 862-63. Ms. Hall testified that she understood IDEA to require reporting, "as often as children that are non-disabled have reports

sent home.”⁶ Tr. 7/8 152. Ms. Hall said that she did not send daily information home during Student’s second year because of Parents’ child complaints and because she felt scrutinized and on trial. Tr. 7/8 64-65. She said she felt she was “under a lot of targeting by both parents.” Tr. 7/8 324-25.

31. At the reconvened August 2001 meeting, the District proposed services totaling 960 minutes per week in an integrated early childhood setting. Ex. R-38 at 386, 401. The Parents agreed to waive DESE’s ten-day waiting period for implementation of a new IEP, although they expressed disagreement with the amount of services proposed. Ex. R-38 at 386. Mother requested additional IEP services including; observation and collaboration with parentally contracted private providers; an additional one hour per week of applied behavior analysis; and daily oral and weekly written reports. Ex. P. 4-5 Ex. R-38 at 386-87, 403; Tr. 7/8: 178, 180. Ms. Hall told Parents that she would provide biweekly reports, but did not agree to mandate that through the IEP. Ex. R-38 at 387; Tr. 7/8: 180-81. Mother explained that Parents were using Applied Behavior Analysis with Student at home, and wanted to try to collaborate programs. Tr. 5/22 854. They sought an “assessment of Student’s current functioning . . . conducted by a person who has expertise in early childhood development, autism, and behavior analysis.” Ex. P-43; Tr. 5/22 856. District did not disagree with using a behavior analysis approach, but would not describe the methodology it was using. Tr. 5/22 856-57. Ms. Hall also testified that she was using errorless learning, a form of applied behavior analysis. Tr. 7/8 179. Ms. Goldman acknowledged in a letter that District was using ABA as one instructional methodology for Student at that time. Ex. P-57. Mother testified that if District had described a

⁶ The IDEA regulations requiring reporting, at least as often as parents are informed of their nondisabled children's progress. 34 C.F.R. §300.347(a)(7)(ii).

strategy of behavior modification Parents would have considered using that in order to coordinate between home and school. Tr. 5/22 857. Ms. Soete denied the request for observation by outside individuals as unnecessary for a free appropriate public education. Ex. P-46. Ms. Hall testified that observation and collaboration with Parent's outside speech pathologist was refused because District had its own speech pathologist and collaboration was not necessary for appropriate education for Student. Tr. 7/8 178. Ms. Hall also testified she did not recall saying it was not necessary for an appropriate education and she stated she never gave a thought to whether the observation and consultation might be helpful. Tr. 7/8 317-319.

32. The August 29, 2001 IEP contains goals and objectives in the following areas: play and leisure skills, social interaction, group instruction, behavior, toileting, tolerating food textures, receptive and pragmatic language, and spontaneous mean length of utterance. The goals and objectives are measurable based primarily on the ABLLS. Ex. R-38 at 391-400; Tr. 7/8 1-186. Parents agreed with use of the ABLLS for that purpose and did not disagree with any of the goals and objectives or other components of the IEP. Tr. 5/22 955; 7/8 182-83, 188. The August 29, 2001 IEP does not include a behavior intervention plan. Tr. 7/8 187. The IEP offered a placement of 960 minutes per week, including individual and group speech/language therapy and occupational therapy consultation. Ex. R-38 at 401; Tr. 7/8 187-88. The IEP notes that Student's progress will be reported to his parents on a quarterly basis. The quarterly progress notes contained on the IEP form indicate that Student was making sufficient progress to achieve his goals within one year's time. Ex. R-38 at 389 and 401.

33. In August 2001 Parents offered to fund training for District staff by private consultants. Tr. 5/22 853. Ms. Soete refused that offer, on the ground that the District's professional development efforts are comprehensive and ongoing. Ex. P-46.

34. On September 18, 2001 Student had a follow-up appointment with Dr. Judith Miles in Columbia. On or about September 18, 2001, Dr. Miles wrote to Ms. Soete and noted that Student "has made significant progress with his language and socialization over the last 15 months although he still exhibits characteristics of autism in his language, socialization and behavior . . ." Ex. R-41 at 415; P-49; Tr. 5/22 858, 935-36. While Dr. Miles wrote that she was "impressed that he is receiving what appears to be thoughtful and appropriate therapy in all of the separate programs," she expressed concern about lack of coordination between home and school. Dr. Miles recommended that additional collaboration occur between Student's home and school programs. Ex. R-41.

35. On or about October 1, 2001, DESE rendered its decision with respect to the Parents' May 31, 2001 child complaint that raised six allegations. DESE concluded that the District was "not out of compliance" with respect to each of the six allegations. Ex. R-42.

36. On October 12, 2001, attorney, Ms. Dayna Deck, wrote to Ms. Goldman reiterating several of Parents' requests. Ms. Deck requested an independent evaluation at public expense and that their occupational, speech, and behavioral therapists be allowed to observe Student at school, "as part of the request for an independent evaluation." Tr. 5/22 859-60. Ex. P-50, at P0757. Ms. Deck asserted that Ms. Hall's refusal to meet regularly because Parents had filed child complaints was discriminatory retaliation. *Id.* at P0756. Ms. Goldman responded on October 17, 2001, stating that request for Parents' outside therapists to observe was denied.

When District later wanted to observe Student at his daycare, Parents refused because of District's refusal to collaborate. Tr. 5/22 939-40.

37. District conducted its own reevaluation of Student in the Fall 2001. Ex. P-53, P-55, P-60. Parents requested that District use outside evaluators, in particular for a functional behavioral assessment by an examiner with expertise in that field. Ex. P-53, at P0773; Ex. P-56, at P0795; Tr. 5/22 867-69. District rejected that request on the ground that its staff was qualified to complete the assessment. R-47 at 454-456. Parents refused District's offer of two hours additional instruction time. R-49, Tr. 5/22, 856, 867-69, 938-39.

38. On October 18, 2001, Ellen Horwitz, Ph.D., a licensed psychologist, corresponded with Parents regarding a psychological assessment she conducted of Student in June 2001. Ex. R-46; Tr. 5/22: 866. Dr. Horowitz wrote that Mother had reported to her that "Student has made a great deal of progress in developing his language skills and play skills. He is also more tolerant of people, new situations and sensory experiences. His emotional regulation is much improved. However, most of what he has learned or changed is due to direct teaching on consistent exposure. Therefore, there are many gaps." Ex. R-46 at 444-445. At that time, Student was generally speaking in complete sentences that followed a formula. Based on the scores from the assessments administered, Dr. Horwitz reported a full year's growth in Student's overall performance with the greatest change in the area of communication where he progressed from the skill level of a 11 month old to a 28 month old. He was 4 ½ at the time and still in the severely autistic range. R-46 at 450. Dr. Horwitz recommended, that the District arrange a consultation with Project ACCESS, complete a series of functional assessments, develop a program of positive behavioral supports for Student and close communication between

home and school so that skills learned in one setting can be reinforced in the other. R-46 at 451-456.

39. In April 2002 Parents requested a full day of observation by their private occupational therapist to help identify Student's sensory needs. Their request was denied on the ground that District staff would perform that function. Ex. P-66.

40. Ms. Hall testified that Student started his second year in early childhood with some disruptive behaviors, but they were gone within the first two weeks. Tr. 7/8 54, 64. She noted that most behaviors occurred when Student was dropped off at school due to the transition from home to school. Tr. 7/8 298. Those behaviors included pushing another child, banging his head, little slaps, and hugging a child around the neck. She described some slapping and resistance with the new speech/language pathologist. Tr. 7/8 54-55, 60.

41. From mid October 2001 through April 2002, Mother's health was poor; her Crohn's disease was flaring up during that period, and she was hospitalized in December 2001 for two weeks. Parents separated for a period during this school year. Tr. 5/20 564; Tr. 5/22 870-71. Ms. Hall testified that Student's behaviors escalated before his mother's hospitalization. Ms. Hall said that when she learned of Mother's health condition and Parents' separation, she became "more tender" with Student and lowered her demands. Tr. 7/8 68-69, 71.

42. Ms. Hall stated that by the January 3, 2002 IEP meeting, Student's behavior was not a concern, "all the behavioral goals and objectives [were] removed from" his IEP, and no new behaviors cropped up. Tr. 7/8 191. That testimony is contradicted by the January 2002 IEP, which indicated in the present levels section that Student was getting agitated to point of screaming and crying, and it contained goals and objectives regarding disruptive behavior. Ex.

R-55, 522, 525; Tr. 7/8 303-04; Tr. 7/9 5. The IEP team reviewed the results of District's reevaluation and revised his IEP. The IEP contains goals and objectives in the following areas: play and leisure, social interaction, group instruction, tolerance of foods, toileting, pragmatic language, interverbal skills, mean length of utterance and receptive language. The majority of goals and objectives use the ABLLS format for measurement. Ex. R-55 at 521-533; Tr. 7/8 190-191. At Mother's request, the IEP team added an objective addressing memory skills. Ex. R-55 at 494. This IEP contained no behavioral goals because behavior was not a concern and Student had mastered all previous behavioral goals. Tr. 7/8 191. District's notes indicate that Mother stated that she had no concerns regarding the revised IEP goals and objectives. The team discussed Student's transition to kindergarten and determined that his paraprofessional, Ms. Stokes, would take him to visit the kindergarten classroom, the elementary cafeteria and other elementary school settings during the remainder of the 2001-02 school year. R-55 at 494. Mother agreed with this transition plan. At the conclusion of the meeting, Mother expressed her pleasure with the reevaluation and with the kindergarten transition process. R-55 at 494. The January IEP proposed a placement of 1140 minutes per week in an early childhood setting and for Student to have a trained paraprofessional to implement his transition to kindergarten. R-55 at 532. Tr. 7/8 193.

43. On or about January 10, 2002, DESE rendered its decision regarding Parents' 18-count August 13 child complaint. DESE found the District in compliance on all but two of the 18 allegations. With respect to allegation 15, DESE stated that the IDEA did not require a behavior plan for all students who exhibited behavioral problems and that the IEP team decided whether a plan was necessary. Ex. R-57 at 555.

44. Ms. Hall testified that at the time of the April 26, 2002 IEP meeting there were no behavior concerns in the classroom, although there were with the speech pathologist. Tr. 7/8 199-200. The present levels section of this IEP contradicts Ms. Hall's testimony. It states Student gets "very upset to the point of an outburst . . . he uses a loud, high-pitched, repetitive whine . . . he may be removed for a short period to calm down." Ex. R-60, 581. Ms. Hall later admitted that his behavior was not generally under control, so she wrote a behavior plan to deal with his yelling out. Tr. 7/9 73.

45. During Student's second year (2001-2002), Ms. Hall was not available to speak to Parents when they dropped him off in the morning or picked him up in the afternoon. Tr. 7/8 66-67. Documentation for Student's second year includes biweekly forms Ms. Hall agreed to send home, relating to Student's time in the center-based part of his program, not any of the itinerant time. Tr. 7/8 204-05, 7/9 138-39, 200. Those forms show yelling in September and early October 2001. Ex. R-63, 617-20. Other documentation shows more disruptive behaviors. Ex. R-63.

46. The April 26, 2002 IEP shows that District found Student eligible for extended school year services to work on goals relating to language and behavior (including sitting "without engaging in disruptive behaviors" and attending to teacher. Ex. P-64, Goals 8, 9, 10, 11 and P0931. In Spring 2002 Parents noticed dramatic changes in Student's behaviors, including increased screaming and rigidity, and decided that he needed a more intensive intervention to try to extinguish some of those behaviors. Tr. 5/22 870, 945. Instead of sending him to District's summer program, Parents took Student to Behavior Analysts, Inc., in California, for a program designed and implemented by Dr. Partington as supervisor and Steve Ward as primary therapist.

Student received intensive therapy trying to extinguish behaviors for three weeks, and for three more weeks the program focused on assessing whether he could implement those skills around typical peers. Ex. P-68; Tr. 5/22 871-72. The formal report from that Summer 2002 program describes the data collected during his time at the clinic. Ex. P-68. The clinic worked on a variety of skills. Ex. P-68. Mother testified that by the end of the six weeks the mean length of a tantrum reduced from 20 minutes to 3 minutes. Tr. 5/22 1029.

47. At the Hearing Parents offered to show portions of video tapes from the end of Student's program in California. The Hearing Panel sustained District's objection to the use of excerpts from the tapes when such excerpts were not provided to District five (5) days prior to the resumption of the Hearing. Mother described that the videos at the end of the Summer 2002 program were very different from the early sessions, and the later tapes would show that the token board was extremely reinforcing. Tr. 5/22 1037-38.

48. When Parents returned from California in Summer 2002 they shared information with District about the clinic program. Mother again requested collaboration with District to work together on specific behaviors. Ms. Hall stated that methodology was District choice, but that they would consider Mother's suggestions. Mother stated that District did not have to use a specific token board or any token board at all, but just some form of regular reinforcement that she would like to know about. Tr. 5/22 876-877. Ms. Hall agreed that Mother did not insist on a particular system of reinforcers. Tr. 7/8 126.

49. In May 2002, Deanna Jones was hired to serve as a special education teacher for the District. Ms. Jones has a bachelor's degree in the educable mentally handicapped and the severely handicapped. She is certified to teach children with those disabilities as well as children

with behavior disorders. She had prior teaching experience when she accepted the District's position, although she had minimal experience teaching children with autism. Tr. 5/21 612-13, 620-21, 725. In May and August, she met with Ms. Hall to prepare for teaching Student, and was informed of her role in implementing Student's behavior plan. Tr. 5/21 636-37, 640, 647. During the Summer 2002, she attended a training in autism and attended further training in November 2002. Tr. 5/21 621. When she was informed that she would be teaching a child with autism, Ms. Jones did not hesitate because she believed that her prior training and experience with behavioral issues would assist her. Tr. 5/21 746.

50. At the beginning of the 2002-03 school year Mother testified that she attempted to repair her relationship with Ms. Hall, who told her that Mother could not expect to have a good relationship with District staff because she had filed complaints. Tr. 5/22 863-64. Recently, at the April 2003 IEP meeting, District again refused Parents' request for regular daily communication. District staff indicated difficulties with communications leading to complaints. Tr. 5/22 864-65.

51. In August 2002, Student began in the District's regular education kindergarten program as specified in his April 2002 IEP. Tr. 5/22 879; 5/7/8 82, 211. In contrast to the ECSE program, kindergarten was a full-day program. Tr. 7/8 95. Ms. Tamara Copeland was his regular education kindergarten teacher and Ms. Jones was his special education teacher. Kim Stokes was assigned to work specifically as Student's paraprofessional. Ms. Hall, as the District's IDAC, served as the autism consultant for Student. Ms. Ann Branson was his speech-language pathologist and Ms. Donna Hoelscher was his occupational therapist. Tr. 7/9 82-83.

During kindergarten, Student did not receive any outside supplemental therapies provided by Parents. Tr. 5/22 963.

52. Mother attended the first day of Kindergarten with the other parents. Mother told Student's regular classroom teacher, Ms. Copeland that she would like to come in the next couple of days to observe. Ms. Copeland testified at the Hearing in person. Ms. Copeland called Mother that evening to tell her she would not be allowed in the classroom, based on District's general policy to exclude parents during the first two weeks. Tr. 5/22 879-80. Mother expressed concern about not being allowed in the classroom to the principal the next day and her concern that without intervention Student's behaviors would return. Tr. 5/22 880-81. The principal would not allow Mother in the classroom and told Mother that she needed to trust her and the District staff. Tr. 5/22 882. Mother was allowed to observe Student at school over two days in late September or early October 2002 and to volunteer in the classroom throughout the year. Tr. 5/22 886-89.

53. When Student returned to school in August 2002, Ms. Hall observed that he was much more verbal than he was previously and, as a result, he displayed more oppositional behaviors than when he left in May. Tr. 7/8 93-94, 285; 7/9 71. Previously, Ms. Hall had been able to distract Student and get him back on task. At the beginning of kindergarten, she observed him engaging in more power struggles, similar to those she observed on the STARS videotapes. Tr. 7/9 71-72. She determined Student would require removal from the regular classroom for calming and so that other students' learning was not disrupted. Tr. 7/8 94. She testified that the April 2002 IEP's behavior plan anticipated and authorized such removal and placed no time limitations on removal. Tr. 7/9 150-51. At the time, Student's behavior plan only addressed

yelling out which was the one behavior that Ms. Hall observed in ECSE and that she predicted would occur in kindergarten due to its greater demands. Tr. 7/8 101, 113.

54. Ms. Copeland sent all Kindergarten parents a weekly report (on a page divided into nine squares covering the nine-week quarter). On some of these reports Ms. Copeland indicated when Student was removed from the classroom for behavior. Tr. 5/22 890; Ex. P-14, at P0092. Ms. Copeland testified that she thought daily communication with Parents was reasonable and she attempted to communicate with them as well as she could. She stated she had a good relationship with Mother. Tr. 7/9 308-10.

55. After learning in October 2002 that Student was removed twice for pushing other students, Mother wrote asking to be kept informed of things Student needs to work on or problems he was having on a daily index card. Tr. 5/22 891. Those notes do not contain information about Student's behaviors or his being removed from the classroom. Ex. P-98. In October and November 2002 Student was becoming physically aggressive, and Mother asked for information about what behavior plan was in place to help prevent these behaviors. Tr. 5/22 892-95; Ex. P-14, at P0094. Mother asked Ms. Stokes, the paraprofessional, about what plan was in place to deal with Student's behaviors. Ms. Stokes told her she should talk to Ms. Hall. Tr. 5/22 896-99. From the beginning of the 2002-2003 school year, until an IEP meeting on November 26, 2002, Mother perceived the situation with Ms. Hall as tense. Tr. 5/22 898-99. Ms. Hall agreed at the November 26, 2002 IEP meeting to discuss the behavior reinforcement plan with Mother at a later time. Tr. 5/22 897. That discussion did not occur until February 26, 2003. Ex. P-85.

56. District provided Parents with daily written communication regarding Student's behaviors at the beginning of the kindergarten year or until September 16, 2002. Tr. 7/8 115-16. Ms. Hall testified she stopped sending regular information about behaviors and interventions, "when Mother started writing letters around October or so." [T]he flags came up again about everything's going to be scrutinized that went home." District did not send biweekly forms as it did the prior year. Tr. 7/9 200-201. Ms. Hall said she did not send regular information about Student's removals for disruptive behavior, because District was only required to report quarterly. Tr. 7/8 278-79. She said she did not think about Parents' need to know, even if Student were removed for more than time allowed by his initial IEP, more than 60 minutes per week. Tr. 7/9 14-15. She sent no regular reporting to Parents that Student's time removed from the classroom was increasing as the year went on. Tr. 7/9 25.

57. Another sporadic type of written communication from District was "notes home," which a staff member could send for more serious behaviors. Tr. 7/8 224-25. Ms. Hall testified that each staff member decided when to send a "notes home." Tr. 7/9 96. Parents received seven "notes home" between October 2 and December 3, 2002. Ex. R-90 966-69.

58. Due to Student's yelling and power struggles, the District implemented what it called removal or compliance based on staff observations of the STARS videotapes. Tr. 5/21 752, 7/8 113, 143. Compliance consisted of removing Student from the classroom to a neutral setting, waiting him out and requiring him to comply with the original task that had been presented. Ms. Hall testified that removal/compliance was not intended to be punitive or used as discipline, but was used to calm Student. Tr. 7/8 143-44. Initially, Ms. Hall determined when

compliance should be used, but Ms. Jones assumed this responsibility after she became more familiar with Student. Tr. 5/21 752-53, 755.

59. Ms. Hall implemented a system of collecting and reviewing data with respect to Student because she was not present on a daily basis to teach and observe him. Ex. R-87; Tr. 7/8 242-49. She conducted ongoing functional assessments based on this data and on her own observations. Tr. 7/8 211. The data collection system was intended to allow Ms. Hall to monitor the instances of Student's yelling out as well as his removals. Ms. Stokes used a stopwatch to monitor the minutes of removal. Tr. 7/8 242. Ms. Hall analyzed Student's data on a weekly basis and periodically prepared graphs and charts to monitor his progress. Ms. Hall prepared some narrative reports that were provided to Parents. Tr. 7/8 244-246.

60. Ms. Jones testified that she supported that Parents be provided a daily record of Student being removed from the classroom for behavior within the District. She said that the daily information would not have been in Student's file at the end of each day. She agreed that daily communication about Student's behaviors would have allowed Parents to reinforce appropriate behaviors at home and would have made District's efforts to reduce his disruptive behaviors more effective. Tr. 5/21 652. Ms. Soete's response was that if Mother wanted to know what was happening on a daily basis, she could follow procedures to look at his records. Tr. 5/21 652. Ms. Hall agreed that if Parents wanted to know about Student's disruptive behaviors and removals from the classroom on a regular basis, they could make an appointment and review the records. Tr. 7/9 100-01. When asked why she could not send copies of the same information home, Ms. Hall explained that it had to go through her, because "I'm the professional," and because it was District policy. Tr. 7/9 106-07. Ms. Hall testified that she

agreed with Ms. Goldman that she wouldn't send ABC forms home because it could have caused some "negative fallout." She later said she wouldn't say "fallout," but that they would be scrutinized. Tr. 7/9 153-180.

61. Ms. Copeland was the District's kindergarten teacher for six years and she had taught for 1 ½ years in other districts. Tr. 7/9 243 -44. She testified in person at the Hearing. She is certified to teach elementary education (K-8), early childhood (birth through grade 2), and art education (K-9). Tr. 7/9 244. Although Ms. Copeland is not certified to teach special education, she took Project Access courses in anticipation of having Student in her classroom. Tr. 7/9 244-46, 264-65. During the 2002-03 school year, Ms. Copeland had 16-19 children in her regular education kindergarten classroom. The kindergarten program was a full-day, lasting from 8:00 a.m. to 3:00 p.m. Ms. Stokes was student's paraprofessional and Ms. Copeland also had the assistance of another paraprofessional on a part-time basis. Tr. 7/9 251-53. Ms. Stokes' role was to assist Student, help him with transitions and remove him if necessary for compliance. Ms. Copeland would determine when Ms. Stokes should remove Student for compliance and would do so only when his behavior interfered with the rights of the other children or their learning. Ms. Copeland testified that removal was an appropriate intervention for Student and, in her opinion, Student was not removed more than was necessary during the year. Tr. 7/9 266-67.

62. Ms. Ann Branson was Student's speech-language pathologist during the 2002-03 school year. She testified in person at the Hearing. She has 30 years of experience in the field, including 28 years in public schools; she has a bachelor's degree in speech correction with a minor in education, a master's degree in the same field, her certification of clinical competence from her professional association. She is licensed as a speech-language pathologist by the

Missouri Board of Healing Arts. Ms. Branson had very little experience working with children with autism. To prepare to work with Student, Ms. Branson observed his 2001-02 therapist, Ms. Carla Tiddy and attended a 3-day Project Access training in June 2002. Beginning in August, she worked with Ms. Hall to prepare by reviewing Student's educational records. Ms. Branson noted that he had made progress in his language development. Initially, Ms. Branson worked with Student on his language needs in the regular classroom as specified in the April 2002 IEP (four times a week, for 30 minutes each session) which in her opinion, was adequate time to address Student's language needs. She focused on teaching pragmatic language so that Student could more effectively communicate with his peers. She found that that setting was not conducive to her therapy sessions because Student would become upset that therapy was interfering with his play time. After Student's sessions were moved to her therapy room, Ms. Branson experienced fewer compliance issues. During the year, Ms. Branson observed that Student made progress on the language IEP goals and objectives that she implemented. He began to answer how and why questions, was able to identify the missing parts in a picture, and to tell what had happened prior to the events illustrated in a picture and Student began to speak to Ms. Branson in the hallways after she initiated conversation. Tr. 7/10 16-17.

63. At the beginning of the 2002 school year, Student exhibited the most behavior difficulties in the morning when he had academics and speech therapy in the regular education classroom. Tr. 7/8 226-27.

64. District provided a number of accommodations, strategies and supplementary aides and services to address Student's behaviors. A two-way radio system was used to make Ms. Hall or Ms. Jones available for consultation regarding behaviors when needed. Tr. 5/21

752-53; 7/8 226. Staff used social stories, removal/ compliance, choices, a visual schedule, a stop-light system, a token system, interchanging high and low demands, and sensory activities to address Student's behaviors and other needs. Tr. 5/21 739; 7/8 117-19. Staff made a notebook that Ms. Stokes took with Student to all settings. The notebook contained his visual schedule, his token system, his stop-light system, his social stories, sensory activities and other information so that Student had consistency throughout his school day. Tr. 5/21 731-32; 7/8 250-52. These strategies and accommodations helped Student become independent with respect to his kindergarten routine. Tr. 7/8 282. Each of the above strategies was effective with Student. Tr. 5/21 721, 730, 743, 789. When Student exhibited a new behavior or when Staff anticipated a new situation, Ms. Jones or Ms. Hall would prepare a new social story designed to help teach him appropriate ways to cope with situations. Tr. 7/9 117-18, 252-53.

65. In late October or early November 2002, staff observed Student targeting and pushing one little girl which was the first time that Ms. Hall observed Student display physical aggression. Tr. 7/8 101. In response, staff completed functional analysis ("ABC") forms to determine what was causing that behavior. Initially, Ms. Hall hypothesized that the aggression was because Ms. Stokes was attending to something other than Student. After review, Ms. Hall posited that the little girl looked like Student's sister. Tr. 7/8 102-103. After reaching that hypothesis, Ms. Hall instructed Ms. Stokes to stay close to Student and staff also used social stories with him directed to that situation. After these interventions, the aggressive behaviors ceased because Student had no opportunity to engage in them. Tr. 7/8 103-104. Later, Student learned to self-monitor this behavior by talking himself out of targeting and hitting the little girl. Tr. 7/8 105. Although consideration was given to moving Student or the little girl to another

classroom, staff concluded that that should not be done so that Student could learn appropriate behavior. Tr. 7/8 106. After December 2002, Student no longer engaged in this particular aggressive behavior. Tr. 7/8 108. The District communicated these behaviors to Parents, who were aware of the District's hypothesis that some behaviors were occurring because of the resemblance to Student's sister. Tr. 5/22 932-934.

66. When Parents learned in October 2002 that Student's disruptive behaviors were escalating at school, they contacted Steve Ward, from Behavior Analysts, Inc., to consult and to arrange for him to visit the school in December 2002. Tr. 5/22 900. Student's behaviors were difficult at home, including screaming, resistance to change, toileting, and relations with his sister. Tr. 5/22 932. Mother set up a meeting with Ms. Hall and Ms. Soete for a telephone conference with Mr. Ward, to discuss collaboration regarding Student's behaviors. This call did not take place. Although District agreed to and attempted to speak to him one time, Ms. Hall later told Mother that she would not talk to Mr. Ward because it would make District look like it needed help and could lead to Parents suing District for compensatory damages. Tr. 5/22 901-02, 932. Ms. Hall did not deny making that statement.

67. On November 26, 2002, after a request by Parents, the District reconvened Student's IEP team. Ex. R-72; R-73; Tr. 5/22 902; 7/8 213. At that time, staff had observed that Student needed more opportunity to work on his goal regarding attending to the teacher during instructional time because of the increased demands of kindergarten. Tr. 7/8 96. Ms. Hall testified that Student required preteaching and an opportunity to work on social skills and the yelling, so she recommended to the team that his IEP be modified to include 30 additional minutes per day of structured time in a special education setting. Tr. 7/8 96-97. Ms. Jones

testified that, in her opinion, Student required more time in special education than Ms. Hall was advocating and Ms. Jones wanted a placement where Student could be isolated in a 1:1 setting so that someone could work with him on triggering his behaviors. Tr. 5/21 741-42.

68. The IEP team discussed Student's educational placement and the District proposed an increase of 150 minutes per week in the special education classroom and 120 minutes of speech-language therapy outside of the regular education classroom. Ex. R-73; Tr. 7/9 227. The proposed change in speech-language time was based on the fact that most of Student's upsets were occurring during that therapy time in the regular classroom. Tr. 7/9 98-99. The District proposed 30 minutes per week of occupational therapy in the regular education environment and behavior intervention of 0-300 minutes per week in multiple settings. The 0-300 minutes included removal for compliance as well as reteaching and preteaching. Ex. R-73; Tr. 7/9 227. Parents did not state agreement with the proposed changes in placement, but indicated that they would respond later. Tr. 5/22 97; 7/9 227-28. Mother testified that Parents were not opposed to an increase in Student's special education time, but she is concerned that it may be used to segregate him. Tr. 5/22 1033, 1050. She testified that Parents were not opposed to Ms. Branson implementing Student's therapy in a 1:1 setting with the goal of integrating him back in the regular classroom. Tr. 5/22 1041, 1055. District refused Parents' request for Steve Ward to observe in the classroom on the grounds that no such consultation services were necessary to provide Student with FAPE and, if such consultation became necessary, the District would hire a Missouri Autism Consultant, Ms. Amy Buie. Mother indicated that she would file for due process. Ex. R-73. The November 26, 2002 IEP reflects the changes proposed by the District and the final IEP notes that the initiation date for the IEP was to be December 2, 2002.

Ex. R-74 at 802. The present level of performance prepared by Ms. Hall and Ms. Jones notes that a visual schedule and consistent routine are necessary for Student and, with those interventions in place, he was able to participate in the regular curriculum. Ex. R-74 at 803; Tr. 5/21 703.

69. At the IEP meeting on November 26, 2002, Parents expressed concern that Student's behaviors resulted from inconsistency between the token systems used at home and at school. Parents requested that District allow Steve Ward to help the District perfect a behavior intervention plan by observing Student and providing input to the staff. Tr. 5/22 931; Ex. P-75, at P1126.

70. Ms. Jones testified she agreed with the idea of consistency between school and home in dealing with Student's behaviors, and that no one at the meeting expressed disagreement with that idea. She said that she could have benefited from having an outside expert observe and provide input on working with Student's behaviors. Tr. 5/21 680-682. She testified that she did not believe that the person primarily responsible for consulting with her in dealing with Student's behaviors, Ms. Hall, was adequate for the job. Tr. 5/21, 684, 686. Ms. Hall offered no alternative other than herself, saying "she felt like she could answer all of Father's questions, she could give her all the information she needed." Tr. 5/21 696-97. Ms. Jones acknowledged that she is definitely no expert, and she expressed surprise that District thought it had behavior experts on its team. Ms. Jones stated "that all Mom's really wanting is a consultant on behavior and why can't we have that when . . . to me it showed we needed it." Tr. 5/21 700-701.

71. Ms. Hall did not use an autism expert to observe Student in his educational program and consult with the staff. Tr. 7/8 267. She testified that she and Ms. Stokes were

responsible for implementing Student's ABA program, and Ms. Soete was the supervisor. Tr. 7/8 328. Student was primarily in the regular Kindergarten classroom, where the behavior program was implemented by the regular classroom teacher and paraprofessional (Ms. Stokes) making decisions about the initial response to Student's behavior, implementing the reinforcement systems, and deciding when Student should be removed. Tr. 7/9 126-27. Ms. Hall testified she did not believe it would be harmful for an outside person to observe and consult, but she did not know if it would be beneficial. Tr. 7/8 270; Tr. 7/9 48. Ms. Hall and Ms. Soete agreed that to be able to provide meaningful input to the IEP team, a person from outside District has to observe the child. Tr. 7/9 168; Tr. 7/10 147-48. Ms. Hall stated that she did not believe she needed any outside consultation and that Steve Ward had nothing to offer. Tr. 7/8 219-21. On the other hand, she testified that she did learn from listening to Mr. Ward speaking on the video tapes from the California program. Tr. 7/8 219-21. Tr. 7/8 140. District rejected Parents' request to use Steve Ward, as a behavior consultant, giving as the reason that it "is not required to provide a Free Appropriate Public Education for Student." Ex. P-78, at P1135-34.⁷ Ms. Jones testified that Ms. Soete rejected the request to bring in Mr. Ward for the additional reason that if District wanted an outside person they had a certain radius. Tr. 5/21 681. Parents suggest that District's rejection of their request to use Mr. Ward because it was not necessary for Student to make progress on meeting his goals and objectives, apparently did not consider whether his services would help Student to spend more time in the regular education classroom.

⁷ District would have allowed Mr. Ward to participate in the November 2002 IEP meeting by speakerphone, but without information about what was going on at school and being allowed to observe, Parents indicated they did not believe that would have been worthwhile. Tr. 5/22 981.

73. The November 2002 IEP contains a revised behavior plan that targets the physical aggressiveness displayed by Student and his yelling out as a means of getting his needs met or to escape a demand. Ex. R-74 at 806-07; Tr. 7/8 214-7.8 The behavior plan notes the IEP team's hypothesis regarding the physical aggressiveness and it specifies the interventions to be used when Student displayed the targeted behaviors. Ex. R-73 at 806. Parents did not disagree or agree with the plan, but expressed concern regarding Mr. Ward's consultation. Tr. 7/8 217.

74. The November 2002 IEP contains goals and objectives in areas of: play and leisure, social interaction, group instruction, interverbal skills, expressive language and self-control and behavior. Progress reports in the IEP notes the progress that Student made subsequent to the development of the IEP. Ex. R-74. Mother testified that Parents were not disputing the goals and objectives contained in the IEP. Tr. 5/22 1055; 7/8 214. This IEP changed Student's placement and increased his time in the special education classroom to 150 minutes per week. The placement included using a paraprofessional to assist Student in the regular education classroom, a visual schedule and reinforcers, a behavior intervention plan and autism training. The IEP notes an increase in special education time was "required to limit external distractions during therapy. Behavior intervention is required in a segregated setting to minimize the negative impact of classroom disruptions on non-disabled peers and limit distractions for Student." Ex. R-75 at 819.-20. The IEP indicates that Parents will be notified of Student's progress by use of IEP goal pages on a quarterly basis.

8 The behavior plan was not intended to be a functional analysis of Student's behavior, but just a behavior intervention plan. Tr. 7/8 215.

75. After Parents submitted their request for due process in December 2002, the entire teaching staff was told not to talk to Mother, even about day-to-day matters. Tr. 5/21 642, 708-09, 768; Tr. 7/9 306. That testimony was not rebutted by District.

76. Parents reiterated their requests for collaboration with District in a letter to Ms. Soete dated February 12, 2003. Ex. P-84. Ms. Soete responded in a letter dated February 26, 2003. Ex. P-85. The requests and responses were:

- a. Mother requested daily communication regarding Student engaging in negative behaviors, notice of the consequences he received, and other information about his day. Ms. Soete responded that daily communication was not in Student's IEP and asked if Parents wanted an IEP meeting for consideration of that request.
 - b. Mother asked to observe Student in his special education class and in speech therapy, and to observe the training being provided to his paraprofessional because she wanted "to learn from the staff . . . about the strategies that are being used with Student to deter his negative behavior and to promote . . . appropriate behavior so [Parents] can support District staff and the implementation of Student's IEP goals." Ms. Soete administratively refused such requests, without stating any reasons.
 - c. Mother asked for "the contact person at the District for any ongoing questions, concerns, or information, regarding Student's educational program."
- Ms. Soete informed Mother

You may contact me in regard to any ongoing questions, concerns, or information you may need in relation to special education . . . Ms.

Tucker, Elementary Principal, may be contacted in regard to regular education issues. District's attorney will deal directly with your legal counsel in regard to issues relating to the pending due process hearing.

77. In February 2003, Parents requested that an expert be allowed to observe Student at school as part of an independent evaluation, but District refused. On February 20, 2003, the Chair of the Hearing Panel, over the objection of District, granted Parents' motion to allow an observation. Panel Ex. 6. In a supplemental order, over the objection of District, the Chair allowed the Parent's expert six hours of observation at school and brief conversations with Student's service providers. The observation, by Dr. James Partington, was conducted on April 14-15, 2003. Ex. P-88. Panel Ex. 7. Although Ms. Jones thought she could benefit from consulting with an outside expert, when Dr. Partington was at school for his observation and meetings with staff, Ms. Jones was instructed by Ms. Hall or Ms. Soete not to ask him any questions. Jones, Tr. 5/21 683.

78. Dr. Partington completed his observations and submitted a report, which was provided to District. Ex. P-88. On April 9, 2003, Mother requested an IEP meeting to discuss Dr. Partington's evaluation report and recommendations, regular communication between school and home, and extended school year services. Ex. P-89. An IEP meeting was held on April 28, 2003, Dr. Partington participated in the meeting by telephone. Tr. 5/22 913-14.

79. At the April 2003 IEP meeting, District refused to provide daily communication to Parents or notification when Student was removed from the classroom for negative behaviors, for the reasons, "that mandated reporting of Student's progress, consistent with the schedule of

reporting to parents of nondisabled children is reported quarterly.” Ex. P-102, at 2 and 4; Tr. 5/22 915-16.⁹

80. On or about December 10, 2002, the District gave Parents a written notice of action refusing Parents’ request to use their outside consultant, Steve Ward, on the ground that such consultation was not necessary to provide Student with FAPE. The notice indicates that the District will use its in-district autism consultant (Ms. Hall) and other individuals trained in autism for such consultation. Ex. R-75 at 826-27. Ms. Hall testified that, at the time, the District had not yet had an opportunity to implement the November 2002 behavior plan to see if it would be effective. Tr. 7/8 219.

81. On or about December 10, 2002, the District gave Parents a written notice of action refusing Mother’s request to personally train Student’s school paraprofessional and indicating that the District provided ongoing training for staff. Ex. R-75 at 828-29. On or about December 10, 2002, the District also gave Parents a written notice of action refusing their request to use the token system developed by Parents and their behavioral consultant. Ex. R-75 at 830.

82. Pursuant to state standards, the District was required to wait ten days after delivery of the written notice of change of placement to Parents prior to changing Student’s placement. Tr. 7/8 231-32; 7/9 58. After ten days, state standards obligated the District to implement the new IEP if no due process was filed. The District could have implemented the

⁹ District denied Parents’ requests to implement the recommendations of Dr. Partington on the grounds that District was providing a free appropriate public education and that District awaits the outcome of this due process hearing. Ex. P-102, at 3.

November IEP on December 13, but decided to wait until December 16 because, although hand-delivered on December 3, the notice actually was dated December 4, 2002. Tr. 7/8 232.

83. When Mother brought Student to school on the morning of December 16, 2002 Ms. Hall asked her if Parents had filed due process. Ex. R-82 at 840; Tr. 7/9 232. Mother stated that they had not. Ms. Hall then told Mother that the District was required to implement the November 26, 2002 IEP because of the passage of ten days. Ms. Hall stated that the change of placement required her to take Student to the speech therapy room for therapy with Ms. Branson. Mother asked to accompany Ms. Hall and Student to Ms. Branson's room and they walked Student to the therapy room. Tr. 7/8 232-33. Mother did not state any objection to the implementation of this new placement. Ex. R-82 at 840.

84. On the morning of December 16, 2002, Ms. Soete telephoned DESE to determine if Parents had filed due process. At the time of Ms. Soete's call, DESE had not received a request from Parents. Ex. R-82 at 840; Tr. 7/8 234. On the afternoon of December 16, Mother provided the District with a copy of a "due process request." Ex. R-76; Ex. R-82 at 840. Ms. Soete telephoned DESE's legal counsel, Ms. Heidi Lieberman, and was told that, as of 4 p.m., DESE had not received a request from Parents and, because ten-days had passed, the District should implement the November 26, 2002 IEP, which would be the stay-put IEP in the event Parents filed for due process. Parents offered in evidence an e-mail from DESE stating that the request for Due Process had been received after the office closed on December 16, 2002. Ex. P-____. District has been implementing the November IEP since December 16, 2002. On or about January 8, 2003, Ms. Soete informed Parents in writing that the November 26, 2002 IEP was being utilized as the stay-put IEP. Ex. R-83. Parents did not object to such implementation by

writing to the District, by filing a motion with the due process hearing panel or by seeking injunctive relief in court. Tr. 7/8 236.

85. At the beginning of kindergarten Ms. Copeland told Mother that District would not be doing any interventions with Student for the first few weeks of school to see how he would do in the regular classroom without interventions. Tr. 5/22 880. Ms. Hall testified the District started the year with no behavior system in place for the first couple of weeks. Tr. 7/8 291. Ms. Hall explained to Mother that she intended that Ms. Stokes, the paraprofessional, would back off from Student so the District could see what he would do without a specific program in place, and that they would then devise a behavior program. Tr. 5/22 883-84.

86. Student's IEP for the beginning of kindergarten contained pages captioned Positive Behavior Support Plan, but Ms. Jones testified that that plan "was not the basis for our intervention." Instead, Ms. Jones stated the staff used a behavior compliance plan that was not written anywhere. Tr. 5/21 647-49. When Mother observed Student at school in late September or early October, 2002 she testified that she observed staff "tip-toeing" around his behavior so it would not escalate. Tr. 5/22 886-87.

87. Ms. Hall testified that when Student became disruptive in kindergarten, he was removed from the classroom as part of his behavior plan, for the purpose of teaching him appropriate behavior. Tr. 7/9 127. Until the IEP meeting on November 26, 2002, Student's IEP called for placement in the regular kindergarten classroom for all of his time except for 60 minutes per week of drop-in time in a special education classroom. Ex. P-64, at P0926 (IEP dated April 26, 2002. There were many weeks in which Student was removed from regular kindergarten for more than 60 minutes to deal with his behaviors. Tr. 5/21 802-03; Ex. R-93,

1180. Ms. Hall testified that Student's April 2002 IEP allowed the removals with no time limitation. Tr. 7/9 150-51.

88. Parents' experts testified that any behavior plan for Student is likely to fail without collaboration and consistency between school and home. Ms. Hall disagreed testifying that consistency is only needed if the environments are exactly the same. Tr. 7/8 78; Tr. 7/9 85, 116. On the other hand, she also testified that what happens at home can have a significant impact on what happens at school. Tr. 7/8 38, 348-49.

89. Mother testified that Student's behaviors regressed during kindergarten to about half of the accomplishments achieved during the Summer 2002 program. On the first day of kindergarten, Student was able to comply the entire morning. At the end of the Summer 2002, with a preferred activity and appropriate reinforcement Student was able to sit and attend for up to 20 minutes. In May 2003, Student was only able to stay on task for ten minutes. Tr. 5/22 1043-1047.

90. Ms. Jones testified that she observed a gradual increase in Student's behaviors of pushing a paper to the floor when given a task, yelling out and pushing other children, from the beginning of the school year on August 14, 2002 until late September or early October when Ms. Jones was becoming concerned about his behavior and, at that time or later, "was ready for some help." Tr. 5/21 623-624. Ms. Hall noted on September 16, 2002, that "[f]rom 8/20 - 9/13 Student yelled out in the classroom a total of 93 times recorded" and he had been removed from the classroom a total of 16 times, sometimes short, sometimes for an hour. Ex. P-60, at P0934, P0933. In early October 2002 District noted that he was not making sufficient progress on some of his language goals and, "[d]ue to lack of cooperation, consider change of placement." Ex. P-

64, at P0942, P0940. Ms. Jones testified that she attended a meeting in September with Mother, Ms. Hall and Ms. Copeland, and, although Student's behaviors were already increasing, Ms. Jones did not think Mother was told about it. Tr. 5/21 624-26. Ms. Jones testified that Student's behaviors increased after late September or early October 2002. Tr. 5/21 646-47.

91. A Behavior Incidence Report prepared by Ms. Hall describes some of Student's behaviors from the start of kindergarten until November 27, 2002. The report states that Student was removed from the classroom because of his behaviors 53 times, on 29 of the 66 days he was present (44% of the days), for a total of 1184 minutes. The report incorrectly concludes that Student was removed less than one percent of his time in school (the report says ".04%"). A correct calculation shows Student actually was removed over four percent (4.4%) of the time he was in school from the beginning of kindergarten until November 27, 2002. Ex. R-87 at 860. Tr. 7/9 21-22. Another report, nearly identical to page 860, for the same period, indicates Student was removed one less day and one less time, but has a total of 826 minutes rather than 1184 minutes, a difference of 358 minutes, almost six hours. Ex. R-87, 904. Ms. Hall compiled behavior data after the November, 2002 IEP meeting on additional narrative reports. A report for the period December 2, 2002 to March 14, 2003, states that Student was removed from the classroom because of his behaviors 26 times, on 22 of the 50 days he was present (44% of the days), for a total of 853 minutes. This report incorrectly states he was removed .05% of the time, but, if the raw numbers are correct, he was removed five percent (actually 4.6%) of the time. It states at the top of the page that Student was "present 45 days" during the relevant period, but then bases the calculations on 50 days. If he were there only 45 days, he was removed on 22 of 45 days (49% of the days) and over five percent of the time (5.1%) he was in school. Ex. R-87 at

866. A narrative report for the last portion of this school year, from March 17 to May 22, 2003, states that Student was removed from the classroom because of his behaviors 24 times, on 18 of the 43.5 days he was present (41% of the days), for a total of 1365 minutes. The report states he was removed only .07% of the time, but, if the raw numbers are correct, he was removed over seven percent (actually 7.4%) of the time. Ex. R-98.

92. These examples create doubt as to the accuracy of District's data for Student. When shown that her data established an increase in the amount of time Student was removed from the classroom for behavior issues, from 4%, to 5%, to 7%, Ms. Hall suggested that the time removed was not a significant factor. Her charts and graphs and her own testimony are contradictory. Ms. Hall testified on direct that she kept data for ongoing assessment, "mainly . . . to show how many minutes he was out." Tr. 7/8 245. When Ms. Hall believed the narrative reports showed Student was removed less than one percent of the time, she said they were compiled "so that we would know how many minutes he was being removed, what percentage of his day he was out of the classroom." Tr. 7/8 246. Ex. R-87, 850-53; Tr. 7/9 170-71. Ms. Hall testified that minutes removed were more important than the number of days on which he was removed. Tr. 7/9 147. Ms. Hale, District psychologist, agreed that minutes removed was a significant factor. Tr. 7/9 236-38.

93. Ms. Hall stated that although Student's total time of removal increased, the reasons changed over time. For example, in the first report, difficulty in music accounted for most removals. Tr. 7/9 26. Contradictorily, that report shows that music only accounted for four of the 53 removals. Ex. R-87, 860. Outbursts during class assignments, which were a problem throughout the year, continued to cause Student to be removed into April 2003. Tr. 7/9 27; Ex.

R-98, 1399. Ms. Hall was unable to describe generally how Student's behaviors improved or worsened during the year without referring to the daily anecdotal records. Tr. 7/9 28-29, 34.

The daily records, called ABC reports (for antecedent, behavior, consequence) served as the basis for the narrative reports, charts and graphs. These ABC reports also may not be reliable because they were completed by the paraprofessional, Ms. Stokes, who had difficulty completing them properly and then typed by Ms. Hall, who made changes in the information as she typed. Tr. 7/9 78-81; Ex. R-93, 1023 (handwritten by Stokes); R-87 910 (typed by Hall). There appears to be confusion about the operational definition of the target behavior of yelling, and of other terms used in the reports such as “loudly,” “raising voice,” and “verbal outburst.” Tr. 7/9 86-95; Ex. R-87 943; Ex. R-93 1044, 1049, 1124. The target behavior in the behavior intervention plan in the IEP was “yelling out,” but Ms. Hall testified that the staff changed the definition of the target behavior, from yelling to verbal outburst without amending the IEP, “[b]ecause there was a confusion on how much is he yelling.” Tr. 7/9 94-95; R-74, 808 (IEP). Further, there seems to be confusion between the terms compliance and redirection. Tr. 7/9 89-90.

94. The school records lack information about what was done with Student or how he behaved after he was removed from the classroom, for compliance. Ms. Hall testified that recording the behaviors and the staff’s interventions would have involved too much paper and led to too much scrutiny. Tr. 7/9 81-83.

95. Parents object to the goals and objectives of the Student’s IEPs because they are not written in a way that indicates how progress is to be measured. Tr. 5/22 1042-43. They assert that data collected by District regarding Student’s IEP goals does not provide meaningful information, for example: the data shows that Student was meeting his behavior goal regarding avoiding disruptive behaviors, when he was having several episodes of disruptive behavior. Ex. R-93, 978; 7/9 109-14. Parents were willing to agree to changing the speech services to pull out,

“with the understanding that the goal would be to integrate it back into the regular classroom. And it wasn’t clear that that would be the goal.” Tr. 5/22 1040-42.

96. Ms. Soete, testified that the requirement to provide an education in the least restrictive environment means that after District develops an appropriate educational program for a child, “you see where that program can best be implemented.” Tr. 7/10 123. Ms. Hall testified similarly that least restrictive environment “[m]eans the environment that they can be educated the best” or “[w]here they can progress the most” and she does not believe there is a goal in the IDEA to maximize amount of time a child spends in the regular education environment, and that is not a goal for Student.¹⁰ Tr. 7/8 281, 282; Tr. 7/9 32. When asked about the impact of Student’s disruptive behaviors on his ability to be successful in a regular classroom, Ms. Hall stated “This is not about Student in the regular classroom. This is about Student and his progress. And you keep saying regular classroom. And that’s not where I’m coming from. I’m coming from is he making progress on his goals and objectives, is he being successful as a student.” Tr. 7/9 29-30. District increased his time in special education and changed Student’s placement because of his behaviors. Tr. 7/8 98-99, 212, 280, 284-85.

97. It appears from all of the evidence that at the November 2002 IEP meeting Parents may not have received timely, accurate and complete information about Student’s behaviors or District’s behavior intervention plan. Ms. Hall provided information at the IEP

¹⁰ The IDEA regulations provide: Each public agency shall ensure --
(1) That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and
(2) That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. 1412(a)(5)(A); 34 CFR 300.550(b).

meeting about Student's behaviors, but it is not entirely clear what information and documentation was provided. Tr. 5/22 903-05; Tr. 5/21 664-666. Ms. Jones testified Parents did not get an accurate view of Student's behaviors at IEP meeting, due in part to a time limit on the IEP. She said there was a two-hour limit for the meeting and at the end it was very hurried. Tr. 5/21 657, 679, 704. According to Ms. Jones there was little discussion of how much Student was yelling out and disrupting the classroom or about ways of working to improve his behavior. Tr. 5/21, 657, 672-73, 704. Ms. Hall said that the behavior plan was not really discussed at the IEP meeting. Tr. 7/8 217.

98. Parents and their experts testified that they believe that Student could have been taught not to engage in behaviors that would disrupt the regular classroom. Mother testified that more could be accomplished in the regular classroom, while not eliciting escalated behaviors, but by introducing something that is known to be upsetting slowly and with constant reinforcement to make it a positive experience. Tr. 5/19 155-57; Tr. 5/22 972-73. Mother explained that Parents are worried about the lack of an appropriate behavior intervention plan because: "Our grave concern is that Student's behaviors will continue to escalate and interfere with his ability to be integrated with typical peers. And that over time, he will receive less time with typical peers because of his behavior." Tr. 5/22 1036.

99. Ms. Jones agreed with Parents and their experts that a better behavior intervention plan could have reduced Student's behaviors and there would have been a "great chance" that he would have been able to spend more time successfully in the regular classroom. Tr. 5/21 722-23.

100. Parents' experts testified generally that a behavior plan cannot be effective for Student without sufficient expertise in the person who analyzes his behavior and designs and

oversees the implementation of the plan. Ms. Hall did not have relevant experience prior to working with Student. and she had insufficient training during her work with Student.

101. Ms. Hall's testimony was often inconsistent and seemed based on the belief that if behaviors are related to autism, they either cannot be significantly reduced or will be replaced by other behaviors. Tr. 7/8 130-31, 185-86, 337-38, 340-41; Tr. 7/9 37-38. She testified that as Student's language skills increase she would expect his behaviors to decrease, but that has not happened with Student because of his autism. Tr. 7/8 51-52, 130, 263; Tr. 7/9 129-30, 176. She admits she needed help at least one time, but that there was another time that she didn't understand Student's behaviors. Tr. 7/8 344-45, 296-97. Ms. Hall's opinion that she had sufficient expertise to develop, implement, and monitor Student's program, and train the other staff members is unsupported by the testimony of Parents' experts.

102. At the April 2003 IEP meeting Parents requested an extended school year program for Student because of their belief that he would regress in his behaviors over the summer without a structured program similar to a school environment. Tr. 5/22 914-15. Dr. Partington recommended an extended school year program because Student's "behavior in the past has indicated that he requires consistent expectations be required of him in order to prevent him from engaging in disruptive behavior once demands are again placed on him." District staff stated that, based on their data and observations, they did not believe Student would regress Tr. 7/8 238-39; 7/9 278. Ms. Hall, Ms. Copeland, and Ms. Branson testified that, during Christmas break and after several unexpected snow days, Student was able to return to school each time and be on target. Tr. 7/8 238; 7/9 278-79; Tr. 5/20 475-76. Also Student's language had now progressed to a point where District staff did not believe that he would regress without ESY. 7/9 64-65. Staff did not believe that his behaviors would regress to the point where he could not

recoup appropriate behavioral skills within the relevant time. Tr. 7/9 65, 68. Ms. Hall testified she believed Parents could provide needed structure at home. Tr. 7/9 165. District refused Parent's request for ESY and gave them with a written notice of action to that effect. Tr. 7/9 914-16; 5/22 240. District recommended that Student attend the District's regular summer program and indicated that Ms. Stokes would be available to serve as his paraprofessional if Parents decided to send him. Tr. 5/22 240.

103. Student's case manager at the IEP meeting on April 28, 2003, Ms. Jones, testified that District's decision not to offer extended school year services was made at a staff meeting prior to the IEP meeting, which Parents did not attend. Tr. 5/21 679-79, 710, 712-13. None of District witnesses contradicted her testimony. Ms. Jones testified that she believed that for Student to be integrated into a regular first grade classroom that he needed "some intensive training this summer on shaping his behavior to stay on task, to watch the teacher, to follow directions, and having the opportunity to practice situations where we're almost sure he's going to try to control." Tr. 5/21 758. Ms. Jones said that she did not feel free to disagree with rest of District's team at the April 2003 IEP meeting because she had been marked down on her evaluation for not having a good relationship with the other members of the team and was told that she "needed to carry out the majority of the consensus of the team and present that in the IEP meeting." Tr. 5/21 715-16.

104. According to Ms. Hall, Student made progress during his kindergarten year, in the area of socialization he learned how to share with other children, he allowed other children to use his supplies, and he learned to ask other students for things. Tr. 7/8 99-100. He also demonstrated the ability to tolerate a full-day's routine at school and increased his ability to attend to his teachers. Tr. 7/8 100. Student progressed academically. For example, at the

beginning of the year, Student could write a few words and sound out a few words by sight. By the end of the year, he could read books to the class that were at the kindergarten through second grade level and could write sentences independently. He could read both phonetically and by sight and, by May, was independently reading first-grade books. Tr. 7/9 259-60. In math, he could count over 100 and mastered all other kindergarten math skills. Tr. 7/9 260. Student mastered all the kindergarten skills necessary to be promoted to first grade. Tr. 7/9 261; Ex. R-97; Tr. 7/9 270-72. He progressed in language development. During the first quarter of the year, he was not always able to express himself verbally, but by the fourth quarter, he would ask questions and raise his hand to answer questions. Tr. 7/9 261-62.

105. According to Ms. Hall, Student's physically aggressive behaviors were extinguished by early 2003. He would occasionally yell out, want control or refuse to comply and complete an activity, but by the end of the 2002 – 2003 school year, his ability to attend to the teacher and follow directions was better as was his eye contact. Tr. 7/9 262-63. He progressed in his ability to work in the classroom without outbursts. Tr. 7/9 33. During the year, his non-compliant behaviors became of minor concern to Ms. Copeland because she and the other staff were able to get him back on task. Tr. 7/9 307.

II. CONCLUSIONS OF LAW

1. This case arises under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq.; the IDEA's implementing regulations, 34 C.F.R. Part 300; Missouri's special education statutes, §§ 162.670-162.999, RSMo.; and the Missouri state regulation implementing its special education statutes, 5 C.S.R. § 70-742.140 ("Individuals With Disabilities Education Act, Part B This rule incorporates by

reference changes to the annual program plan required by new federal statutes for the provision of the services to eligible children.”). The Missouri regulation is referred to as the “State Plan”. The IDEA, its regulations and the State Plan for Part B of the Individuals With Disabilities Education Act (2002), set forth the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District in providing special education and related services to students with disabilities.

2. The Student is a “child with a disability,” as that term is defined in the IDEA, its regulations, 34 C.F.R. §300.7 and a handicapped child for purposes of Missouri Law. From an educational perspective Student is diagnosed as autistic.

3. The District is a Missouri School District organized pursuant to Missouri Statutes. Parents and Student are now and have been residents of the District during all times relevant to this due process proceeding, as defined by §162.890 RSMo.; State Plan, Regulation X-D at 118-19. Pursuant to Missouri law, the St. James School District is responsible for providing special education and related services to students with disabilities, as defined by the Missouri State Plan for Implementing Part B of the Individuals with Disabilities Education Act, who reside in the school district including Student.

4. The State Plan was in effect at all material times during this proceeding. The State Plan constitutes regulations of the State of Missouri, which further define the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District, in providing special education and related services to students with disabilities.

5. The purpose of the IDEA and its regulations is: (1) “to ensure that all children with disabilities have available to them a free appropriate public education that includes special education and related services to meet their unique needs”; (2) “to ensure that the rights of children with disabilities and their parents are protected”; and, (3) “to assess and ensure the effectiveness of efforts to educate those children.” 34 C.F.R. § 300.1.

6. The IDEA requires that a disabled child be provided with access to a “free appropriate public education.” (“FAPE”) Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690 (1982). The term “free appropriate public education” is found in the IDEA 20 U.S.C. §1401(8) and is defined by 34 C.F.R. § 300.8 as follows:

“...the term ‘free appropriate public education’ means special education and related services that--(a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include preschool, elementary school, or secondary school education in the State involved; and, (d) Are provided in conformity with an IEP that meets the requirements of §300.340--300.350.” A principal component of the definition of FAPE is that the special education and related services provided to the student with a disability, “meet the standards of the SEA” (State Board of Education), and “the requirements of this part”. 34 C.F.R. Part 300.

7. The IDEA requirement to provide a FAPE “is satisfied when the state provides personalized instruction with sufficient support to benefit educationally from that instruction; the requirement of a FAPE does not require the state to maximize each child’s potential commensurate with the opportunity provided to non-disabled children.” Breen v. St. Charles R. [VI] School District, 2 F.Supp.2d. 1214, 1221 (E.D.Mo.1997), aff’d 141 F.3d 1167, 1998 WL 172602 (8th Cir.1998)(unpublished decision); see also, Rowley, 458 U.S. at 200, 102 S.Ct. 3034;

Reese v. Board of Education of Bismarck R-V School District, 225 F.Supp.2d 1149, 1155 (8th Cir. 2002).

8. If parents believe that the educational program provided for their child fails to meet this standard, they may obtain a state administrative due process hearing. 34 C.F.R. § 300.506; Thompson v. Board of the Special School District No. 1, 144 F.3d 574, 578 (8th Cir. 1998); Fort Zumwalt School District v. Clynes, 119 F.3d 607, 610 (8th Cir. 1997), cert. denied 523 U.S. 1137, 118 S.Ct. 1840, 140 L.Ed2d 1090 (1998).

9. The IDEA is designed to enable children with disabilities to have access to a free appropriate public education which is designed to meet their particular needs. O'Toole by O'Toole v. Olathe District Schools Unified School District No. 233, 144 F.3d 692, 698 (10th Cir. 1998). The IDEA requires the District to provide a child with a disability with a “basic floor of opportunity..., which [is] individually designed to provide educational benefit to the handicapped child.” Rowley, supra., 102 S.Ct. 3034, 3047. The IDEA does not require that a school district “either maximize a student’s potential or provide the best possible education at public expense,” Rowley, supra., 102 S.Ct. 3034, 3049; Gill v. Columbia 93 School District, 217 F.3d 1027, 1034 (8th Cir. 2000); Reese, supra., 225 F. Supp. 2d at 1155, fn. 12; Fort Zumwalt, supra., 119 F.3d 607, 612; and A.W. v. Northwest R-1 School District, 813 F.2d 158, 163-64 (8th Cir. 1987). Similarly, the IDEA does not require a school district to provide a program that will, “achieve outstanding results”, E.S. v. Independent School District No. 196, 135 F.3d 566, 569 (8th Cir. 1998); that is “absolutely [the] best”, Tucker v. Calloway County Board of Education, 136 F.3d 495, 505 (6th Cir. 1998); that will provide “superior results,” Fort Zumwalt, supra. 119 F.3d 607, 613; or, that will provide the placement the parents prefer. Blackmon Springfield R XII v. School

District, 198 F. 3d 648, (8th Cir. 1999); ES., supra. 135 F.3d 566, 569. See also: Tucker, supra., 136 F.3d 495, 505; and Board of Education of Community Consolidated School District No. 21 v. Illinois State Board of Education, 938 F. 2d 712, 716-17 (7th Cir. 1991).

10. A key component of IDEA for delivery of special education is the “individualized education program,” or “IEP.” Honig v. Doe, 484 U.S. 305, 311 (1988).

The IEP is developed as a result of collaborations between parents, educators, and representatives of the school district. It “sets out the child’s present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives.” Id.

11. Parents object that they were not able to fully participate in Student’s IEP meetings because after being informed that Father is ADHD District refused to allow them to tape record the meetings. However, District provided Parents with minutes of IEP meetings. Parents have been represented by two attorneys during their disputes with District and they did not seek accommodations under the Rehabilitation Act.

12. The November 26, 2002 IEP for Student was developed in accordance with the requirements of the IDEA. Parents were given ample opportunity to participate in the development of this IEP. However, it appeared from the testimony at the hearing that although consideration was given to the need for District Staff to receive adequate training from knowledgeable and experienced experts in the field of autism and behavioral intervention, insufficient training was provided to all employees on the team working with Student. While the Hearing Panel believes that Ms. Nancy Hall is well intentioned, it is the conclusion of the majority of the Hearing Panel after hearing all of

the testimony and reviewing the extensive exhibits received in evidence that Ms. Hall is not sufficiently experienced or trained herself to adequately train all of the others who provide services for Student. If the District chooses to continue to use Ms. Hall as IDAC, she needs additional, continuous training, preferably training under supervision of an experienced and qualified autism consultant, in behavioral intervention, data gathering, data analysis and reporting. Such consultant may be a person of the District's choosing and need not be Mother or Steve Ward.

13. All District staff, who provide services to Student, must be afforded additional training under supervision of an experienced and qualified autism consultant in areas of behavior intervention and data gathering. Such consultant may be a person of the District's choosing and need not be Mother or Steve Ward.

14. The testimony and evidence revealed that for a variety of reasons, including those documented in the above Findings of Fact, the relationship and communication between Parents and District was poor. Because good communication is important to offering FAPE to Student, District should establish a means of regular, communication with Parents that informs them when Student's disruptive behaviors escalate and when Student is removed from class for purposes of "compliance." This may be a simple written communication, such as the index card system that has been used in the past. It should be more frequent than quarterly and should not require Parents to come to school to review records. Daily verbal communication with Parents or their proxy is not required.

15. The determinations made by District in Spring 2001 and Spring 2003 IEP meetings that Student was not in need of an extended school year program were

supported by the evidence and testimony heard by the Hearing Panel, particularly when District offered to have Student's paraprofessional, Ms. Stokes, assist him in the regular summer program during Summer 2003.

16. In addition to the requirement for FAPE found in the IDEA, there is also a "strong Congressional preference" for educating students in the least restrictive environment. Carl D. v. Special School District. of St. Louis County, Mo., 21 F.Supp.2d 1042, 1058 (E.D. Mo. 1998) ("IDEA evidences a strong congressional preference for mainstreaming").

17. St. James Elementary School is the least restrictive environment for Student and is the preferred placement for Student under the IDEA. Blackmon, supra. The question raised here is whether pursuant to the November 26, 2002 IEP Student was sufficiently integrated in a regular classroom with adequate supports and supplemental services. Based on the evidence and testimony heard by the Hearing Panel, including testimony of Mother and Dr. Partington that Student needed some 1:1 special education time and that Student benefited from his time with Ms. Branson in the speech room, the Hearing Panel finds that the change in placement that occurred on December 16, 2002 was appropriate and did not violate Student's right to be integrated in the regular classroom to the maximum extent feasible at that time.

Hearing Panel members Mooney and Rice find that:

18. The delay in convening the November 26, 2002 IEP and the fact that District staff felt inhibited in expressing a need for additional consultation and training together with the lack of adequate communication to Parents regarding the implementation of behavior strategies lead to the conclusion that Student was not

provided with FAPE. In addition the November 26, 2002 IEP is not reasonably calculated to provide Student with educational benefit because while it offers Student personalized instruction and supports to allow Student to benefit educationally from that instruction, it needs a more focused and detailed behavior intervention plan to be sufficient to provide FAPE to Student. Breen v. St. Charles R [VI] School District, supra.

III. DECISION

It is the decision of a majority of the members of this Hearing Panel that:

1. The November 26, 2002 IEP for Student was developed in accordance with the requirements of the IDEA in that Parents were given ample opportunity to participate in the development of this IEP.

2. The delay in convening the November 26, 2002 IEP and the fact that District staff felt inhibited in expressing a need for additional consultation and training together with the lack of adequate communication to Parents regarding the implementation of behavior strategies lead to the conclusion that Student was not provided with FAPE.

3. The November 26, 2002 IEP is not reasonably calculated to provide Student with educational benefit because while it offers Student personalized instruction and supports to allow Student to benefit educationally from that instruction, it needs a more focused and detailed behavior intervention plan to be sufficient to provide FAPE to Student. Breen v. St. Charles R [VI] School District, supra.

4. District Staff on the team working with Student did not receive sufficient training in behavior intervention and data gathering.

5. Ms. Hall is not sufficiently experienced or trained herself to adequately train all of the others who provide services for Student. Ms. Hall needs additional, continuous training, preferably training under supervision of an experienced and qualified autism consultant in behavioral intervention, data gathering, data analysis and reporting. Such consultant may be a person of the District's choosing and need not be Mother or Steve Ward.

6. All District Staff, who provide services to Student, must be afforded additional training under supervision of an experienced and qualified autism consultant in areas of behavior intervention and data gathering. Such consultant may be a person of the District's choosing and need not be Mother or Steve Ward.

7. District must establish a means of regular, communication with Parents that informs them promptly when Student's disruptive behaviors escalate and when Student is removed from class for purposes of "compliance." This may be a simple written communication, which should be more frequent than quarterly and should not require Parents to come to school to review records.

8. Determinations made by District at the Spring 2001 and Spring 2003 IEP meetings that Student was not in need of an extended school year program were supported by the evidence and testimony.

9. The change in placement that occurred on December 16, 2002 was appropriate and did not violate Student's right to be integrated in the regular classroom to the maximum extent feasible at that time.

10. District did not interfere with Parents' participation in developing Student's IEP by refusing to allow Parents or professionals hired by them to observe student in his education programs.

11. District did not interfere with Parents' participation in developing Student's IEP by refusing to allow Parents to tape record the IEP meetings when it provided Parents with minutes of the meetings.

IV. ORDER

Parents' Request for Due Process is granted in part and dismissed in part as set forth in the above Decision and an Order is entered consistent with the Findings of Fact, Conclusions of Law and Decision set forth above.

V. APPEAL PROCEDURE

PLEASE TAKE NOTICE that these Findings of Fact, Conclusions of Law, Decision and Order constitute the final decision of the Department of Elementary and Secondary Education in this matter and you have a right to request review of this decision pursuant to the Missouri Administrative Procedures Act, §536.0 10 et seq. RSMo. Specifically, §536.110 RSMo. provides in pertinent part as follows:

1. Proceedings for review may be instituted by filing a petition in the circuit court of the county of proper venue within thirty days after the mailing or delivery of the notice of the agency's final decision....
3. The venue of such cases shall, at the option of the plaintiff, be in the circuit court of Cole County or in the county of the plaintiff or of one of the plaintiff's residence...

PLEASE TAKE NOTICE that you also have a right to file a civil action in Federal or State

Court pursuant to the IDEA. See 34 C.F.R. §300.512.

Dated: August ____, 2003

Margaret M. Mooney, Hearing Chair

Gale Rice, Panel Member

Panel Member Betty Chong files the attached Dissent.

Copies of this Decision have been mailed to the Parents and Counsel for the St. James School District on this date by certified mail return receipt requested.

Due Process Hearing Panel Minority Decision

, Complainant

vs.

St. James R-1 School District, Respondent

The majority opinion is held by Margaret Mooney, Panel Chair, and Gail Rice, Panel Member.

This minority opinion is held by Betty Chong, Panel Member. Based upon the facts presented into evidence, the testimony rendered during the hearing, and applicable law, I must respectfully disagree with the majority conclusions related to the following issues:

1. Paragraph 12 (II. Conclusions of Law): The majority opinion states that Ms. Nancy Hall is not sufficiently experienced to adequately train all of the other staff members who provide services for the Student.

Prior to serving this Student, Ms. Hall had 10 years of experience in education. Prior to the writing the IEP dated November 26, 2002, Ms. Hall had participated in several trainings sponsored by Project Access, a state-supported entity funded to provide trainings in autism: Introduction to Autism, Early Intervention for Young Children with Autism, Sensorimotor Integration, The Very Special Child in the Regular Elementary, and Working with Students with Autism in Discrete Trial Formats. She was sufficiently trained to be recognized as an In-district Autism Consultant by Project Access. Other trainings included Teaching Language to Children with Autism, which focused on practices used in the applied behavioral analysis program espoused by Vincent Carbone, Working with Children with Aberrant Behavior taught by Amie Buie, and Crisis Management taught at Boys and Girls Town of Missouri. In addition, Ms. Hall attended the Autism Educator's Network meetings which focused on issues in autism,

consulted with colleagues in other school districts, used resources from the Center for Innovations in Special Education, and reviewed the STARS videotapes provided by the parents. Ms. Hall has certification in special education and has acquired 30 graduate level hours.

IDEA does not specify a level of credentials needed by special education providers to serve children with autism, nor does a state certification exist for teaching children with autism. The parents “are not contending that the district’s conduct results in a substantive violation of the federal free appropriate public education requirement.” All parties agree that the Student has made significant academic progress. The fact that the Student has made academic progress would, in part, indicate that the Student’s behavioral goals and objectives have been addressed appropriately. Therefore, Ms. Hall would seem to have had adequate training to be a knowledgeable and contributing member of the team that developed the IEP and provided services to the Student. Ms. Hall was not the sole provider of training for the District staff.

If Ms. Hall continues to serve the District as an In District Autism Consultant, I believe, with the expectation that the Student’s behavior may vary with developmental stages, she could benefit from additional, continuous training, preferably under supervision of a qualified autism consultant in behavior intervention, data gathering, data analysis and reporting. Such consultant may be a person of the District’s choosing and need not be Mother or Steve Ward.

2. Paragraph 13 (II. Conclusion of Law): The majority opinion states that all District staff, who provide services to Student, must be afforded additional training under supervision of an experienced and qualified autism consultant in areas of behavior intervention and data gathering.

The District has provided various training in autism to the staff in preparation of serving a child with autism.

The District's certified school psychologist, Deborah Hale has participated in Project Access workshops: Introduction to Autism, Evaluation of Children with Autism, Discreet Trail Format, and Sensorimotor Integration. In addition, she has had training in autism at Judevine Center in St. Louis, Rational Emotive Behavior therapy with Dr. Albert Ellis, and Positive Behavior Supports with Dr. Tim Lewis. She also attends the Autism Educator's Network meetings.

Ann Branson, who has 30 years of experience as a speech-language pathologist with the clinical certification of competence, participated in a Project Access training, observed the former speech-language provider, and conferenced with the parent regarding the STARS program.

The regular classroom teacher, Tamara Copeland, has taught six years and participated in two Project Access trainings: Introduction to Autism and a training for the regular education teacher in working with a child with autism.

Deanna Jones, special education teacher who is certified in Mental Retardation and Behavior Disorders and has 8.5 years of teaching experience, participated in the Project Access training, Introduction to Autism, and in Decreasing Aberrant Behaviors taught by Amie Buie.

The rationale for paragraph 11 also applies to this paragraph. The District has demonstrated a good faith effort to train its staff to work with a child with autism and the Student is making significant progress toward his goals and objectives. Therefore, the District staff has demonstrated adequate training.

I believe, as the Student changes his behavior to reflect developmental stages and to ensure continued progress, the District staff could benefit from additional training, preferably under supervision of a qualified autism consultant in behavior intervention and data gathering. Such consultant may be a person of the District's choosing and need not be Mother or Steve Ward.

3. Paragraph 14 (II. Conclusions of Law): The majority opinion concludes that the relationship and communication between Parents and District were poor and that good communication is important to offering FAPE to Student.

The Parents contended that the District refused to communicate regularly with Parents, including regarding disciplinary actions and behavioral issues that result in removal from classroom, and new intervention strategies –specifically, during the kindergarten year (Parents' Post Hearing Brief).

Testimony and evidence indicated daily reports were provided by special education personnel during the first two weeks of the kindergarten year (2002-2003). The regular education teacher sent parents a weekly report and the paraprofessional completed daily index cards that were given to the parent. In addition to these regular reporting mechanisms mentioned, "Notes Home" and "Student Discipline Report" were generated to inform the parents of inappropriate behaviors. Between October 2, 2002, and November 19, 2002, six "Notes Home" provided the parent information regarding inappropriate behaviors and explanations regarding how the staff addressed the behaviors. Between October 1 to November 21, three "Student Discipline Reports" were sent by authorized school personnel. Between October 8 to November 13, the kindergarten teacher informed the parents of three inappropriate behavioral situations. On October 24, the school district notified the parent of an IEP meeting scheduled on

November 13. The last IEP was written on April 26, 2002, prior to Student's enrollment in kindergarten.

IDEA requires that parents be regularly informed (by such means as periodic report cards), as specified in their child's IEP, at least as often as parents are informed of their nondisabled children's progress, of their child's progress toward the annual goals in the IEP and the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year. The IEP dated April 26, 2002, indicated quarterly progress would be reported. The District not only provided the quarterly review but also provided frequent information through the daily reporting by the teacher and by the paraprofessional, as well as the reporting through the use of the "Notes Home" and "Student Discipline Reports." IDEA also requires an annual review of the IEP. Since the District was scheduling an IEP meeting to revise/review the IEP after three months of kindergarten, coupled with the other methods of communication, the District was meeting, perhaps exceeding, the IDEA requirement for reporting progress toward goals and objectives.

This panel member must consider how the relationship between the Parents and District was negatively impacted by the four child complaints filed against the District by the parent and the 43 letters dated between May 7, 2001, to June 14, 2001, and sent to District by the parents.

The resulting relationship could perhaps be improved if the District and Parents could agree to a simple written communication, such as the index card system that has been used in the past. It could be more frequent than quarterly and daily verbal communication with Parents or proxy is not required.

4. Paragraph 18 (II. Conclusions of Law): The majority concludes that the delay in convening the November 26, 2002, IEP and the fact that District staff felt inhibited in expressing a need for additional consultation and training together with the lack of adequate communication to Parents regarding the implementation of behavior strategies lead to the conclusion that Student was not provided FAPE.

The federal statute (Appendix A to Part 300-Notice of Interpretation) indicates that “each goal must include either short-term objectives or benchmarks. The purpose of both is to enable a child’s teacher (s), parents, and others involved in developing and implementing the child’s IEP, to gauge, at intermediate times during the year, how well the child is progressing toward achievement of the annual goal. As early as January 2002, itinerant services for transition were begun so that the kindergarten teacher could begin working with the student. On April 26, 2002, the IEP team developed a more detailed plan to transition the Student from a center-based Early Childhood Special Education program with small group and individual instruction to a large group classroom setting with push-in language therapy and 0-60 minutes of drop-in time for special education. A personal paraprofessional, visual scheduling, token system, safe place, and so forth were also included. The team did not limit the minutes that the student could be removed from the classroom for inappropriate behaviors. On October 24, 2002, the school district notified the parents of an IEP meeting scheduled on November 13, 2002. This notification met the state requirement for informing the parents 10 days before the IEP meeting. The revised IEP was completed November 26, 2002. District personnel reported that they did not believe outside consultation was necessary to provide FAPE. As discussed in the comments regarding paragraph 14, this panel member believes the District did communicate regularly with the Parents.

Therefore, it is the opinion of this panel member that the District made a good faith effort to revise the IEP in a timely manner and that the Student was afforded FAPE.

The majority also concludes that the IEP needs a more focused and detailed behavior intervention plan to be sufficient to provide FAPE to Student. IDEA requires no specific format for a behavior intervention plan. It further states, "The IEP team also shall- In the case of a child whose behavior impedes his or her learning or that of others, consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior." IDEA requires a district to provide a behavior intervention plan and conduct a functional behavioral assessment only where the student had been removed from the current educational placement for more than 10 consecutive school days or when a series of removals constitute a pattern of suspension.

In this situation, the District needed only to consider positive behavioral interventions and strategies, and the rules requiring a BIP do not apply to the Student. Nevertheless, in their consideration of the Student's behaviors, the District elected to develop a behavior intervention plan (BIP). The BIP developed during the IEP meeting on November 26, 2002, identified two behaviors: shoving/hitting others-specifically one little girl and yelling out. The first inappropriate behavior was extinguished before January 2003. The BIP for the second behavior, yelling out, defines the problem behavior, hypothesizes regarding the behavior, offers replacement behavior/teaching intervention, describes environmental interventions, and provides a crisis intervention plan and severe clause. In addition, the BIP describes antecedent/setting event strategies, alternative skills to be taught, instructional consequence strategies, reduction

oriented consequence strategies, methods for measuring reduction of problem behaviors, and method for measuring the increases in alternative skills. The BIP is focused and detailed.

The parents “are not contending that the district’s conduct results in a substantive violation of the federal free appropriate public education requirement.” The regular education teacher reports that the Student has mastered the academic skills necessary to be promoted to the first grade. Inasmuch as the student is learning indicates that his behavioral problems, at least in part, have been addressed. Thus, this panel member believes the BIP is sufficient to provide FAPE.

The explanations mentioned above provide the basis for the minority dissent of the following decisions:

2. The delay in convening the November 26, 2002, IEP and the fact that District staff felt inhibited in expressing a need for additional consultation and training together with the lack of adequate communication to Parents regarding the implementation of behavior strategies lead to the conclusion that Student was not provided with FAPE.
3. The November 26, 2002, IEP is not reasonably calculated to provide Student with educational benefit because while it offers Student personalized instruction and supports to allow Student to benefit educationally from that instruction, it needs a more focused and detailed behavior intervention plan to be sufficient to provide FAPE to Student.
4. District Staff on the team working with Student did not receive sufficient training in behavior intervention and data gathering.
5. Ms. Hall is not sufficiently experienced or trained herself to adequately train all of the others who provide services for Student. Ms. Hall needs additional, continuous training, preferably training under supervision of an experienced and qualified autism consultant in behavioral intervention, data gathering, data analysis and reporting. Such consultant may be a person of the District’s choosing and need not be Mother or Steve Ward.
6. All District Staff, who provides services to Student, must be afforded additional training under supervision of an experienced and qualified autism consultant in areas of behavior intervention and data gathering. Such consultant

may be a person of the District's choosing and need not be Mother or Steve Ward.

7. District must establish a means of regular, communication with Parents that informs them promptly when Student's disruptive behaviors escalate and when Student is removed from class for purposes of "compliance." This may be a simple written communication, which should be more frequent than quarterly and should not require Parents to come to school to review records.

This panel member does agree with the majority opinion on these decisions:

1. The November 26, 2002, IEP for Student was developed in accordance with requirements of the IDEA in that Parents were given ample opportunity to participate in the development of this IEP.

8. Determinations made by District at the Spring 2001 and Spring 2003 IEP meetings that Student was not in need of an extended school year program were supported by the evidence and testimony.

9. The change in placement that occurred on December 16, 2002, was appropriate and did not violated Student's right to be integrated in the regular classroom to the maximum extent feasible at that time.

10. District did not interfere with Parents' participation in developing Student's IEP by refusing to allow Parents or professionals hired by them to observe student in his education programs.

11. District did not interfere with Parent's participation in developing Student's IEP by refusing to allow Parents to tape record the IEP meetings when it provided Parents with minutes of the meetings.

Respectfully submitted,

Betty Chong

August 26, 2003